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No. _____

In The

Supreme Court of the United States

October Term, 1992

MICHAEL JACOBSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fourth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the admission of uncharged misconduct evidence as propensity evidence, for which no probable cause to charge existed, deprive an accused a fair trial contrary to due process of law where there is a "reasonable likelihood" the jury convicted the accused of the charged offense on the basis of the uncharged misconduct evidence?

2. Are a defense counsel's errors so serious as to deprive an accused a fair trial whose result is reliable where, because of counsel's errors, (i) uncharged misconduct evidence was admitted as propensity evidence contrary to both the substantive law of the state and due process, (ii) the jury was instructed as if the accused had been charged with other crimes and bad acts when he was not, (iii) the prosecutor's closing summation was substantially predicated on the uncharged misconduct evidence for which no probable cause to charge existed, and (iv) none of the foregoing points was preserved because of procedural default?

PARTIES IN THE COURT BELOW

Petitioner, Michael Jacobson, was the Defendant-Appellant in the court below and the Respondent, People of the State of Illinois, were the Appellees in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES IN THE COURT BELOW ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL OTHER PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

a. Facts And Proceedings In The Trial Court 3

b. Appellate Proceedings And Notice Of Federal Question 9

REASONS FOR GRANTING THE WRIT:

A. THIS CASE SQUARELY PRESENTS AN IMPORTANT FUNDAMENTAL FAIRNESS, DUE PROCESS ISSUE WHICH HAS BEEN THE SUBJECT OF THIS COURT'S ACTIVE CONCERN FOR HALF A CENTURY AND WHICH WAS EXPRESSLY RESERVED LAST TERM IN *ESTELLE V. McGUIRE*, 502 U.S. ___, 116 L.Ed.2d 385 (1991) 11

B. THE DECISION BELOW EXCEEDS THE FAIR TRIAL LIMITATIONS ON THE USE OF UNCHARGED MISCONDUCT EVIDENCE AS PROPENSITY EVIDENCE PERMITTED BY THIS COURT'S PRECEDENTS AND THE LAW OF ALL AMERICAN JURISDICTIONS AND, AS SUCH, PERMITS AN UNRELIABLE RESULT ... 19

TABLE OF CONTENTS – Continued

Page

C. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRECEDENTS AS PERMITTING CONVICTION ON PROOF LESS THAN BEYOND A REASONABLE DOUBT IN VIOLATION OF DUE PROCESS OF LAW 22

D. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRECEDENTS AS PERMITTING A CONVICTION WHERE DEFENSE COUNSEL'S ERRORS WERE SO SERIOUS AS TO DEPRIVE THE ACCUSED A FAIR TRIAL WHOSE RESULT IS RELIABLE 23

CONCLUSION 26

APPENDIX A – Order of Illinois Supreme Court denying Leave to Appeal 1a

APPENDIX B – Order, Judgment and Opinion of the Illinois Appellate Court for the Fourth Judicial District 2a

APPENDIX C – Order and Judgment of the Illinois Circuit Court for the Eighth Judicial Circuit, Mason County, Illinois 36a

APPENDIX D – Petitioner Jacobson's "Motion to Remand to Circuit Court for Filing of and Proceedings on a Second Amended Post-Trial Motion" 42a

APPENDIX E – Appellate Court's Denial of Motion to Remand to Circuit Court for Proceedings on a Second Amended Post-Trial Motion ... 54a

TABLE OF CONTENTS – Continued

Page

APPENDIX F – Trial Testimony of Timothy Hockett in the Circuit Court Setting Forth the Uncharged Misconduct 56a

APPENDIX G – Preliminary Hearing Proceedings in the Illinois Circuit Court ... 69a

APPENDIX H – Point and Authorities Raised in Petitioner Jacobson's Opening Brief in the Illinois Appellate Court 93a

APPENDIX I – Point and Authorities in Petitioner Jacobson's Reply Brief in the Illinois Appellate Court 107a

TABLE OF AUTHORITIES

Page

Cases

Ake v. Oklahoma, 470 U.S. 68 (1985) 21

Ashe v. Swenson, 397 U.S. 436 (1970) 16

Boyd v. United States, 142 U.S. 450 (1892) 11, 12, 19

Boyde v. California, 494 U.S. 370 (1990) 17, 25

Burgett v. Texas, 389 U.S. 109 (1967) 14, 15

Dowling v. United States, 493 U.S. 342 (1990) 16, 19

Estelle v. McGuire, 502 U.S. ___, 116 L.Ed.2d 385 (1991) ..... *passim*

Huddelston v. United States, 485 U.S. 681 (1988) 15, 19

In Re Winship, 397 U.S. 358 (1970) 20, 23, 26

Jackson v. Virginia, 443 U.S. 307 (1979) 23, 26

Kimmelman v. Morrison, 477 U.S. 365 (1986) 23, 24

Lockhart v. Fretwell, ___ U.S. ___, 61 L.W. 4155 (1993) 16, 23, 24, 25

Marshall v. Lonberger, 459 U.S. 422 (1983) 15

Michelson v. United States, 335 U.S. 469 (1948) 12, 13, 19, 20

Nix v. Whiteside, 475 U.S. 157 (1986) 25

Parker v. Randolph, 442 U.S. 62 (1979) 17, 22, 25

People v. Emerson, 97 Ill.2d 487 (1983) 22, 24

People v. Hendricks, 137 Ill.2d 31 (1990) 21, 22, 24, 25

People v. King, 165 Ill.App.3d 464, 518 N.E.2d 1309 (2nd Dist. 1988) 24

People v. Lindgren, 79 Ill.2d 129 (1988) 24

TABLE OF AUTHORITIES – Continued

Page

People v. Stewart, 105 Ill.2d 22, 473 N.E.2d 840 (1984) 24

Spencer v. Texas, 385 U.S. 554 (1967) 13, 14, 19

State v. Johns, 301 Ore. 535 (Ore. 1986) 19

Strickland v. Washington, 466 U.S. 668 (1984) .. 10, 23, 25

CONSTITUTION

United States Constitution, Amendment VI 2

United States Constitution, Amendment XIV, §1 2

STATUTES

Ill.Rev.Stat. Ch. 38 §12-4(b)(6) 3

28 U.S.C. §1257 2

42 U.S.C. §1983 6

RULES

Rule 41(a)(1)(1) Fed.R.Civ.P. 6

Rule 404(b), Federal Rules of Evidence 2, 15, 16, 20

MISCELLANEOUS

Illinois Pattern Jury Instruction, Criminal 3d, §3.14 (1992) 7, 24, 25

H. Kalven and H. Zeisel, THE AMERICAN JURY (1966) 20, 23

Imwenkerlied, UNCHARGED MISCONDUCT EVIDENCE (1984) 18

TABLE OF AUTHORITIES — Continued

Page

Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 Wash.L.Rev. 289 (1989) *passim*

Mendez, *California's New Law and Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. Rev. 1003 (1984) 20

J. Weinstein and M. Berger, WEINSTEIN'S EVIDENCE (1988) 18

Weinstein and Berger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 Iowa L. Rev. 579 (1985) 20

1A WIGMORE ON EVIDENCE (Tiller's Ed., 1983) 20

No.

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent

On Petition For Writ Of Certiorari To The Illinois Appellate Court For The Fourth Judicial District

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Michael Jacobson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court for the Fourth Judicial District affirming petitioner's judgment of conviction on a jury verdict rendered by the Illinois Circuit Court for the Eighth Judicial Circuit, Mason County, Illinois.

I. OPINIONS BELOW

The opinion of the Illinois Appellate Court for the Fourth Judicial District (App. B, *infra*, 2a-35a), is not reported. The judgment of conviction rendered by the

Illinois Circuit Court (Reither, J.) (App. C, *infra*, 36a-41a), is not reported.

II. JURISDICTION

The judgment of the Illinois Appellate Court (App. B, *infra*, 2a-35a, was entered September 2, 1992 from which Petitioner sought leave to appeal to the Illinois Supreme Court which was denied February 3, 1993 (App. A, *infra*, 1a). This Petition for Certiorari is being brought within 90 days of the denial by the Illinois Supreme Court of Petitioner's Petition for Leave to Appeal in that court. Petitioner invokes this Court's jurisdiction under and pursuant to 28 U.S.C. §1257.

III. CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

A. United States Constitutional, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

B. United States Constitution, Amendment XIV, §1.

> No state shall make . . . deprive any person of life, liberty, or property without due process of law. . . .

C. Rule 404(b), Federal Rules of Evidence.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity

therewith. It may however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

IV. STATEMENT OF THE CASE

a.

Facts And Proceedings In the Trial Court

Petitioner, Michael Jacobson, was convicted after a jury trial of aggravated battery on a police officer contrary to the provisions of *Ill.Rev.Stat.* Ch. 38 §12-4(b) (6).[1] He was sentenced to two years probation, ordered to pay restitution and serve 120 days in the county jail and fined $1,000 plus court costs. The Illinois Appellate Court affirmed that conviction. App. B 2a-35a.

At the time of his arrest, Jacobson was the comptroller of the Mason County, Illinois District Hospital located in Havana, Illinois, the county seat. On Friday, September 7, 1990 in the early evening, Jacobson and his wife, Lenora, volunteered their services at the beer tent, an attraction at the Mason County fall festival conducted in Havana the weekend of September 7-9, 1990. Jacobson and Lenora worked until 11:00 p.m. after which they

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[1] *Ill.Rev.Stat.* Ch. 38 §12-4(b) (6) provides:

(b) A person who, in committing a battery either:

(6) knows the individual harmed to be a peace officer, or a person summoned and directed by him, or a correctional person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest.

repaired with another couple to a local pub where they remained until approximately 11:45 p.m. At that time they left and began walking the five blocks to their home.

While they were walking home, Lenora tripped on an elevation in the sidewalk, fell and cut her chin. Jacobson helped Lenora up and they resumed walking along the sidewalk with Jacobson holding onto her.

At or about the time Lenora fell, Timothy Hockett, one of the carnival workers associated with the fall festival, claimed he saw, from a one block distance, a man hitting a woman in the same block but opposite side of the street from where Lenora fell. Hockett could not identify the individuals involved. Nevertheless, he crossed the street from where he said he saw the striking and reported his observations to Mason County Sheriff's Office.

The sheriff's dispatcher radioed the substance of Hockett's report to two officers, Mason County Sheriff's Deputy Gregory Cox and Havana City Police Officer, Larry Seward. Both the officers were, at the time, outside Seward's patrol car at the southwest corner of the Mason County, Illinois courthouse square area, the square being the locus of most fair activities and events. Upon receiving the dispatch, Seward and Cox drove one block north along the western perimeter of the square, turned right and proceeded one block east along the northern perimeter of the square and thence into the next block where the dispatch had indicated a man beating a woman.

The officers proceeded the entire length of the second block but saw no evidence of a man hitting a woman. However, one of the officers testified as they passed

Jacobson walking with and holding onto Lenora, that he heard "whimpering". The officers proceeded to the end of the block, turned around, headed back west and passed Jacobson and Lenora a second time. They stopped and asked if anything were wrong. According to the officers, Jacobson swore at them, told them nothing was wrong and told them to mind their own business. According to Jacobson, he said nothing was wrong but that his wife had fallen and he was walking her home. Jacobson and Lenora both testified that Jacobson did not swear or direct obscene language at the officers.

Both the officers and Jacobson agree that Jacobson then asked the officers for a ride home so that he could drive his wife to the emergency room of the hospital for observation. The officers agreed to Jacobson's request and gave him and Lenora a ride to their home. The officers both testified that at the time Jacobson and Lenora got into the police car, Jacobson was not under arrest. The officers also admitted that while they suspected Jacobson may have hit his wife, they did not have probable cause to arrest him for it. Additionally, they admitted that Jacobson was sober and thereby physically and legally able to drive Lenora to the emergency room.

When the officers arrived with Jacobson and Lenora at their home, Officer Cox, who was riding in the front passenger seat of the patrol car, got out and opened the right rear door to let Jacobson and his wife out. At that point, the officers testified Jacobson was the first out of the car and, without provocation, hit Officer Cox

requiring Officer Seward to physically subdue Jacobson.[2] The officers then arrested Jacobson for aggravated battery of a police officer. Incident to arresting Jacobson and taking him to the hospital for injuries he sustained in being subdued by Seward, the officers left Lenora standing in the front driveway of her home.[3]

At the state trial in September, 1991, the state's first witness was Timothy Hockett. He testified that he saw a man beating a woman in the same 100 block where Jacobson and his wife first met the police officers. App F, 57a-68a. Jacobson was in the courtroom at the time Hockett testified. App. F, 57a. Hockett was not asked to and did not identify Jacobson as the man who he had seen hit a woman. App. F, 57a-68a. Hockett was not asked to and did not identify Lenora as the woman who had been hit. App. F, 57a-68a. Jacobson's counsel did not object to the

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[2] Jacobson's and Lenora's testimony was that Lenora was the first out of the car and that Officer Cox started to lead her away at which point Jacobson held onto her shoulder whereby Cox pushed Jacobson away from Lenora and back against the patrol car by which time Seward had left the driver's seat and had come around the rear of the patrol car and, with his 13' long flashlight, struck Jacobson in the bridge of his nose and forehead area. The only witnesses to these circumstances were Jacobson, Lenora, Seward, and Cox.

[3] Jacobson sued in federal court pursuant to 42 U.S.C. §1983 charging the officers with false arrest and excessive force. Jacobson voluntarily dismissed that case pursuant to Rule 41(a) (1) (1), Fed.R.Civ.P., in the wake of the criminal conviction in state court. It has been refiled but, by agreement of all the parties, is being held in abeyance pending the ultimate resolution of the criminal matter.

introduction of Hockett's testimony. App. F, 57a-68a. Hockett's testimony was not offered to show identity, plan, motive, scheme, design, etc. App. F, 57a-68a.

After Hockett, the officers testified as to Jacobson's swearing at them, to their theory that he was angry at them for suspecting him of hitting his wife, and to the circumstances of Jacobson's alleged striking of Cox. Jacobson took the stand in his own behalf. He was cross-examined on the prosecutor's theory that he was angry at his wife for having supposedly flirted with a friend while at the pub in support of the prosecution's theory that he had hit her. Jacobson denied he was even aware she had flirted. Lenora was cross-examined on the theory that she had been flirting with someone at the pub thereby incurring Jacobson's anger. She denied she had been flirting with anyone. No evidence was offered by the prosecution that she had, in fact, been flirting with anyone.

The trial court instructed the jury on the elements of aggravated battery under Illinois law and other customary elements incident to a criminal trial. The trial court did not, however, instruct the jury in accordance with Illinois Pattern Jury Instruction, Criminal §3.14 (I.P.I. – Criminal 3d, 1992), that the evidence concerning Jacobson's alleged striking of his wife had been admitted for any limited purpose.[4] Jacobson's trial counsel did not

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[4] I.P.I. – Criminal 3d, §3.14 (1992) provides: "Evidence has been received that the defendant has been involved in [(offenses) (an offense)] other than that charged in the [(indictment) (information)]. This evidence has been received solely on the issue of defendant's [(identification) (presence) (intent) (motive) (design) (knowledge)]. This evidence may be consid-

request the trial court to so instruct the jury. Jacobson's trial counsel did not raise in his post-trial motion the failure of the trial court to instruct the jury that evidence of Jacobson's allegedly hitting his wife had been offered for a purpose other than to show Jacobson's propensity to commit the offense of aggravated battery against Officer Cox with which he had been charged and for which he was on trial.

Additionally, Jacobson's counsel permitted, without objection, the jury to be instructed that Jacobson was not entitled to use force to resist an arrest and the officers were not required to abstain from necessary force to effect an arrest. However, by all accounts, at the time force was used by anybody, Jacobson was neither under arrest nor threatened with arrest. Rather, the officers suspected that he had struck his wife but did not have probable cause to charge him with it. App. G, 88a.

In a closing argument consisting of sixteen transcript pages, eight of those pages in whole or in part were devoted to the prosecution's wife beating theory. Five pages in whole or in part were devoted to the circumstances of the alleged battery of Officer Cox. The remainder of the prosecutor's closing argument dwelled on burdens of proof, credibility and matters relating to the function of the jury. In his closing, the prosecutor told the jury among other things:

> "If you remember the sergeant [in the Hill Street Blues television show] always told the police

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ered by you only for the limited purpose for which it was received."

> officers be careful out there. That is because there is danger out there. There is danger every time the police officer gets in his car everyday because of people like him [referring to Jacobson]. Big guys, tough guys, drinking guys, beat your wife guys, guys who are going to say no one is telling me what to do."

There was no objection to any of the prosecutor's closing argument by defense counsel.

After the trial court's judgment was entered on the jury verdict and Jacobson was sentenced, Jacobson, through his trial counsel, filed a notice of appeal. Jacobson secured new counsel for purposes of perfecting his appeal to the Illinois Appellate Court.

b.

Appellate Proceedings And Notice Of Federal Question

On appeal, Jacobson discovered that the trial record had not been preserved with respect to any of the issues which the record demonstrated needed to be advanced on appeal including issues going to the constitutional propriety of the admission of the other crimes, bad acts evidence as propensity evidence and ineffective assistance of counsel. Accordingly, Jacobson moved the appellate court to remand the case to the trial court so that the errors he anticipated raising on appeal, including the constitutional questions, could be presented to the trial court. App. D, 42a-52a. It was in that motion that Jacobson first presented the constitutional questions presented in this petition. The appellate court denied his motion to remand. App. E, 4a, *infra*.

Thereafter, in his opening brief on appeal, Jacobson argued as plain error and violative of federal due process the offering and admission of other crimes, bad acts evidence as propensity evidence, i.e., evidence admitted without limiting instructions. App. H, 94a-98a. Jacobson also argued he had received constitutionally ineffective assistance of counsel, an argument raised in this petition. App. H, 98a. Jacobson raised other federal due process questions in his appellate court brief which he is not advancing in this petition. In his reply brief in the court below, Jacobson further discussed the uncharged misconduct and effectiveness of counsel questions presented in this petition. App. I, 107a-112a.

In its opinion, the Illinois Appellate Court seemed to acknowledge that Jacobson had raised the issue of the admission of prior crimes, bad acts evidence as propensity evidence violative of federal due process. App. B, 15a. However, the lower court seemed not to treat the issue as a constitutional question. App. B, 16a-19a. Rather, it concluded that the evidence had been properly admitted under Illinois law and that no error occurred. App. B, 16a-19a. Rather, it concluded that the evidence had been properly admitted under Illinois law and that no error occurred. App. B, 16a-19a. Therefore, the court concluded, it did not need to resolve whether the admission of uncharged misconduct evidence had been waived or whether the Constitution had been violated. App. B, 16a-19a.

The court did, however, specifically address the petitioner's constitutional ineffectiveness of counsel argument. App. B, 33a-35a. It concluded that because "defendant's alleged errors either did not exist or were not prejudicial, he had failed to establish the prejudice

prong of the *Strickland (v. Washington*, 466 U.S. 668 (1984)) test, i.e. "but for defense counsel's errors, the result of the trial would have been different." App. B, 35a.

REASONS FOR GRANTING THE WRIT

A.

THIS CASE SQUARELY PRESENTS AN IMPORTANT FUNDAMENTAL FAIRNESS, DUE PROCESS ISSUE WHICH HAS BEEN THE SUBJECT OF THIS COURT'S ACTIVE CONCERN FOR HALF A CENTURY AND WHICH WAS EXPRESSLY RESERVED LAST TERM IN *ESTELLE v. McGUIRE*, 502 U.S. ___, 116 L.ED.2D 385 (1991).

The first question presented in this case squarely raises a slightly narrower version of the issue specifically reserved in *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed.2d 385, 401 n. 5 (1991). In *Estelle, supra*, this Court said that it "express[ed] no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." *Id.* In this case, the defendant was convicted not on "prior crimes" but rather on uncharged misconduct evidence for which no probable cause to charge existed. Therefore, the due process problem presented by this case is, if anything, more sharply etched than the due process issue reserved in *Estelle, supra*. That issue has a long history in this Court.

For example, in 1892, in *Boyd v. United States*, 142 U.S. 450 (1892), the Court considered the propriety of a murder conviction deriving from a homicide committed

during a robbery on an Indian reservation. Evidence of prior robberies committed by the defendants during the month prior to the charged homicide offense was admitted. The trial court instructed the jury that the evidence was to be considered only on the issue of the identity of the felony murderers. This Court, 142 U.S. at 458, reversed and said:

> "No notice was given by the indictment of the purpose of the government to introduce proof of [the prior robberies]. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March and yet, they may have been innocent of the murder . . . in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. . . . "

The Court did not, however, discuss the impact of that evidence in due process terms.

Nor did the Court discuss other crimes evidence in specific due process terms in *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). Yet, in a character evidence context, the Court, per Justice Jackson, decided whether a defendant's character witness could be cross-examined on his knowledge of a defendant's prior arrests. In holding that he could, the Court recognized that bad acts

evidence offered to prove the supposed criminal propensities of a criminal defendant was historically rejected at common law. It was rejected, the Court said in *Michelson*, 335 U.S. at 475-76,

> "not . . . because character is irrelevant; on the contrary, it is said to weigh to much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to fend against a particular charge."

Id. Rather, the Court said in *Michelson*, "[t]he overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson, supra*, 335 U.S. at 476.

Since *Michelson, supra*, this Court has resolved a number of issues relative to the admissibility of uncharged misconduct evidence by permitting its admission. For example, in *Spencer v. Texas*, 385 U.S. 554 (1967), this Court considered the issue raised by several cases before it whether the Due Process Clause permitted state court juries to consider prior convictions as part of the primary charge under a state recidivist statute providing for enhanced penalties. The Court noted that no claim was made that the recidivist statutes themselves were unconstitutional, that it was unconstitutional for a jury to assess punishment or that juries should not be told of a defendant's prior crimes.

This Court upheld the recidivist scheme at issue in *Spencer, supra*. However, it did so specifically noting that, "[t]he defendants' interests [were] protected by limiting

instructions (citation omitted) and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence." *Spencer, supra,* 385 U.S. at 561.

In a separate opinion in *Spencer,* Chief Justice Warren noted that,

> "[w]hile this Court has never held that that use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause."

Spencer, supra, 385 U.S. at 573-574 (Opinion of Warren, Ch. J.). Whether "evidence of prior crimes introduced for no purpose other than to show criminal disposition [does] violate the Due Process Clause", *Id.,* has never been resolved by this Court or any court. It is the issue squarely presented in this case.

But, in *Burgett v. Texas,* 389 U.S. 109 (1967), the Court did exclude the use of a prior criminal conviction in a subsequent trial where that prior conviction had been unconstitutionally procured. In *Burgett,* the prior conviction was procured without the assistance of counsel. However, *Burgett* is of limited application.

In *Marshall v. Lonberger*, 459 U.S. 422 (1983), the Court, on habeas corpus, considered the constitutionality of Lonberger's conviction of "aggravated murder" under Ohio law based in part on the admission into evidence of facts relating to his previous conviction on a guilty plea in Illinois of a felony involving bodily harm. Lonberger claimed the Illinois conviction was unconstitutionally procured. The Ohio trial court conducted a hearing and determined that the guilty plea to the Illinois charge was knowing and voluntary and should be submitted to the jury for purposes of proving the elements of the Ohio "aggravated murder" offense. This Court was required under 28 U.S.C. § 2254(d) to accord presumptive correctness to the Ohio court's findings of fact. Those findings established that Lonberger's guilty plea was knowing and intelligent and that the Illinois conviction was, therefore, constitutional. Accordingly, the Court held that it was not bound by the rule of *Burgett v. Texas*, *supra*, excluding for any purpose the admission of a "conviction" of other crimes where the conviction was unconstitutionally procured.

In *Huddelston v. United States*, 485 U.S. 681 (1988), this Court considered under Federal Rule of Evidence 404(b) whether a district court had to make a preliminary finding that the prosecution had proved the "other acts" by a preponderance of the evidence before it submitted such evidence to the jury. This Court held it did not. Rather, it held the structure of Rule 404(b) was such that the other crimes evidence was admissible if there was sufficient evidence to support a finding by the jury that the defendant had committed the similar act or acts.

In *Dowling v. United States*, 493 U.S. 342 (1990), the Court addressed the Rule 404(b) Federal Rule of Evidence admissibility of other crimes evidence on which a defendant had been acquitted under double jeopardy and due process grounds. The defendant in *Dowling* argued first that the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970), barred the evidence. This Court disagreed. It held that collateral estoppel did not bar other crimes evidence where the prior acquittal based on that evidence did not determine the ultimate issue in the charged offense.

Additionally, in *Dowling*, this Court held that the admission of the other crimes evidence on which the defendant had been acquitted did not violate the due process test of fundamental fairness. In so doing, this Court rejected the petitioner's arguments that the other crimes evidence was "inherently unreliable"; that it "creat[ed] a constitutionally unacceptable risk the jury [would] convict . . on the basis of inferences drawn from the acquitted conduct; that the admission of the evidence created a risk of inconsistent jury verdicts; and that the evidence "contraven[ed] a tradition that the government may not force a person acquitted in one trial to defend against the same accusation in a subsequent proceeding." *Dowling, supra*, 493 U.S. at 353-54. But, in admissible both at common law and under Federal Rule of Evidence 404(b). When it is admitted and used in a carefully constricted fashion, due process in the sense of insuring a fair trial, whose result is reliable, is not offended. Cf. *Lockhart v. Fretwell*, ___ U.S. ___, 61 L.W. 4155, 4156-57 (1993).

Importantly to this case, this Court in *Estelle v. McGuire, supra,* noted that even though there may have been some deviation from substantive California law in the limiting instruction that was given, there was, nevertheless, "not a 'reasonable likelihood' that the jury would have concluded [the] instruction, read in the context of other instructions, authorized the use of propensity evidence pure and simple." *Estelle, supra,* 116 L.Ed.2d at 400. See *Boyde v. California,* 494 U.S. 370, 381-84 (1990).[5] But, in this case without any limiting instructions, the jury had no choice but to consider the other crimes evidence as "propensity evidence pure and simple." *Estelle, supra; Parker v. Randolph,* 442 U.S. 62, 73 making those determinations, this Court held that the admission of the other crimes evidence did not violate due process, *"[e]specially in light of the limiting instructions provided by the trial judge . . . "*, 493 U.S. at 353. (Emphasis supplied).

Unlike *Dowling, supra,* and all the other cases where this Court has permitted other crimes, misconduct evidence, this case presents the circumstance where there were no limiting instructions. It presents the circumstance where there was no probable cause to prosecute on the basis of the uncharged misconduct evidence. Rather, the jury was left to speculate on evidence insinuating that

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[5] See also *Parker v. Randolph,* 442 U.S. 62, 73 (1979), where this Court held that the

> "crucial assumption is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct the jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed."

Jacobson might have been a wife beater and that as such he was probably the type who would have battered a police officer. That was the prosecutor's point precisely in his closing argument, *supra* at 9.

The importance of the first issue presented in this case is underscored by what this Court specifically did not decide in *Estelle v. McGuire, supra,* 116 L.Ed.2d at 401 n.5. In *Estelle,* this Court permitted the use of evidence showing prior injuries to the victim suggesting prior bad acts. But, this Court's analysis demonstrates how other crimes, bad conduct evidence can be limited so as to preserve the fundamental fairness of a criminal trial. That occurs when the evidence is admitted for and tied by the instructions to the limited purpose for which it is and has been historically (1979).

That the other crimes, bad acts evidence question presented in this case is important is reflected in the significant amount of commentary which the admissibility and use of such evidence have spawned for a long time. See, for example, the studies and authorities cited in Imwenkerlied, UNCHARGED MISCONDUCT EVIDENCE, Sec. 1.04 at 8 and n.9 (1992); J. Weinstein and M. Berger, WEINSTEIN'S EVIDENCE, ¶ 404-9 to 404-11 and ¶ 404[08] at 404-56, Lewis, *Proof Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases,* 64 Wash. L. Rev. 289, 321-327 (1989). Most commentaries argue for greater limitation on the use of such evidence than now exists. *E.g.,* Lewis *supra* at 322-26 and authorities cited therein.

The foregoing summary demonstrates that the due process outer limits, if any, of the use of uncharged

misconduct evidence have not been established. The foregoing summary also demonstrates that this is a subject of great judicial and academic concern and debate. See Lewis, *supra*, 64 Wash. L. Rev. at 320-327 and studies cited therein. *State v. Johns*, 301 Ore. 535, 725 P.2d 312, 317 (Ore. 1986). The Illinois Appellate Court's resolution of the issue presented in this case – that no constitutional problem was presented at all by the admission of other crimes evidence as propensity evidence – leaves the issue specifically reserved in *Estelle, supra*, starkly presented in this case. This case is, therefore, well suited to enable this Court to provide meaningful guidance on the due process limits, if any, to the use of uncharged misconduct or other crimes evidence as propensity evidence.

B.

THE DECISION BELOW EXCEEDS THE FAIR TRIAL LIMITATIONS ON THE USE OF UNCHARGED MISCONDUCT EVIDENCE AS PROPENSITY EVIDENCE PERMITTED BY THIS COURT'S PRECEDENTS AND THE LAW OF ALL AMERICAN JURISDICTIONS AND, AS SUCH, PERMITS AN UNRELIABLE RESULT.

The situation presented in this case is more extreme, more fraught with the likelihood of an unreliable result and, therefore, more fundamentally unfair than the situations presented in *Spencer, supra; Michelson, supra; Huddelston, supra; Dowling, supra;* and *Estelle v. McGuire, supra*. No case decided by this Court has ever upheld a conviction secured as was Jacobson's conviction in this case. Cf. *Boyd v. United States, supra*, and, *Spencer v. Texas, supra* (opinion of Warren, C.J.). The result reached in this

case contrary to the law in all states and in the federal courts. See 1A WIGMORE ON EVIDENCE § 57 pp. 1180-1198 (Tiller's Ed. 1983) and Federal Rules of Evidence 404(b).

The central due process problem of uncharged misconduct evidence used as propensity evidence is that it creates the likelihood of an unreliable result. Empirical data show, "if the jury learns of uncharged misconduct by the defendant it will probably use a 'different . . . calculus of probabilities' in determining guilt." Lewis, *Proof and Prejudice: A Constitutional Challenge to the Treatment of Prejudicial Evidence in Federal Criminal Cases*, 64 Wash.L.Rev. 289, 326, n.140 (1989), quoting H. Kalven and H. Zeisel, THE AMERICAN JURY, 179 (1966). Moreover, data suggest

> "that uncharged misconduct evidence 'may have such a persuasive influence on the jury that the prosecution is not forced to prove the accused's guilt in regard to the operative facts. . . . [T]he admission of this evidence may conflict functionally with the presumption of innocence which protects the criminal defendant.' "

Lewis, *supra* at 326, quoting Weinstein and Berger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 Iowa L. Rev. 579, 608 n.87 (1985). See also Mendez, *California's New Law and Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 U.C.L.A. L. Rev. 1003, 1059 (1984).

Since *In Re Winship*, 397 U.S. 358 (1970), it has become a matter of constitutional necessity that "[a] verdict of

guilt must be more than a probably accurate reconstruction of historical events; it must inspire confidence that it reflects historical reality with the 'utmost certainty'. . . . " Lewis, *supra* at 313. The imperative for reliability in criminal adjudication was well summarized by this Court in *Ake v. Oklahoma*, 470 U.S. 68, 78-79 (1985):

> "The private interests in the accuracy of a criminal trial that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. . . . "
>
> . . . The state's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by the interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a state may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."

That imperative was disregarded in the court below.

Significantly, the Illinois Supreme Court which declined Jacobson's petition for leave to appeal has consistently struck down convictions secured on the basis of either prior crimes or uncharged misconduct evidence where it was not strictly admitted for the purposes normally permitted under the common law, such as to establish motive, intent, plan, scheme, design, etc. The Illinois Supreme Court's decision in *People v. Hendricks*, 137 Ill.2d 31, 50-55 (1990), relying to a significant extent on this Court's decision in *Michelson, supra*, is a strong statement

to that effect. Additionally, the Illinois Supreme Court's decision in *People v. Emerson,* 97 Ill.2d 487 (1983), perhaps captures the essence of the harm created in a case like this one where it held that "insinuation which leaves a jury to speculate may be more prejudicial than erroneously admitted specific proof." *People v. Emerson, supra,* 97 Ill.2d at 497. As there was no probable cause to even charge Jacobson with battering his wife, ___ a, "insinuation" that he had done so was the extent to which it was established. However, that insinuation was sufficient to give the jury reason to convict him of the battery of Officer Cox.

The lower court in this case attempted to distinguish primarily the Illinois Supreme Court's decision in *People v. Hendricks, supra.* See App. B, ___ a. However, to do that, the lower court was forced to assume that the evidence had been properly admitted for a specific limited purpose. The problem, however, is that even if the evidence was *admissible* for a proper limited purpose, the jury was never instructed as to that limited purpose. Therefore, the jury could never have viewed the uncharged misconduct evidence as anything other than propensity evidence. Cf. *Parker v. Randolph, supra,* 442 U.S. at 73.

C.

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRECEDENTS AS PERMITTING CONVICTION ON PROOF LESS THAN BEYOND A REASONABLE DOUBT IN VIOLATION OF DUE PROCESS OF LAW.

There is a second aspect to the due process problem created by the use of uncharged misconduct evidence as

propensity evidence. That aspect relates to the tendency of uncharged misconduct evidence to diminish the prosecution's burden of proof. See e.g. Lewis, *supra* at 296-301.

In *In Re Winship, supra,* and *Jackson v. Virginia,* 443 U.S. 307 (1979), this Court established as a matter of due process the requirement that the prosecution prove all facts necessary to establish the elements constituting the offense charged beyond a reasonable doubt. Studies, most particularly the Kalven and Zeisel study on the American jury, show that the "presumption of innocence does not in actual fact operate for persons with criminal records and that if the jury learns of uncharged misconduct by the defendant, it will probably use a 'different . . . calculus of probabilities' in determining guilt." Kalven and Zeisel, *supra* at 179, quoted from Lewis, *supra* at 326 n.140.

D.

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRECEDENTS AS PERMITTING A CONVICTION WHERE DEFENSE COUNSEL'S ERRORS WERE SO SERIOUS AS TO DEPRIVE THE ACCUSED A FAIR TRIAL WHOSE RESULT IS RELIABLE.

Under *Strickland v. Washington,* 466 U.S. 668, 687 (1984), a person raising an ineffective assistance of counsel claim "must show both that his counsel fell below basic standards of competence and that he was sufficiently prejudiced by the resulting errors." See also *Kimmelman v. Morrison,* 477 U.S. 365, at 393 (1986) (Powell, J. concurring); *Lockhart v. Fretwell,* ___ U.S. ___, 61 L.W.

4155, 4157 (1993). Thus, to succeed on an ineffective assistance claim, a person must show that counsel's errors were, first, outside the range of competence demanded of counsel in criminal cases (the performance prong) and that counsel's errors denied him "a fundamentally fair trial – a trial in which the determination of guilt or innocence [was] 'just' and 'reliable' ", *Kimmelman v. Morrison, supra* at ___, (Powell, J. concurring). See also *Lockhart v. Fretwell, supra,* 61 L.W. at 4157.

In Illinois, it has long been the substantive law that prior crimes, bad acts evidence or uncharged misconduct evidence cannot be admitted for the purpose of proving that the defendant in a criminal case acted in conformity with that evidence. See *People v. Hendricks, supra; People v. Emerson, supra; People v. Lindgren,* 79 Ill.2d 129 (1988). That principle of Illinois law is so well established that the Committee Note to I.P.I. – Criminal 3d, § 3.14 (1992), recites that "the Illinois Supreme Court *has made clear* that evidence of other crimes is admissible if it is relevant to establish any fact material to the case *other than propensity to commit crime.*" (Emphasis supplied), citing *People v. Stewart,* 105 Ill.2d 22, 62, 473 N.E.2d 840, 860 (1984). In addition, the Committee Note stresses that "care must be taken to state the proper limited purpose for the evidence," *Id.*, citing *People v. King,* 165 Ill.App.3d 464, 518 N.E.2d 1309 (2nd Dist. 1988).

It is undisputed in this case that Jacobson's counsel did not object to the admission of the uncharged misconduct evidence. He did not cause the prosecution to offer that evidence for only an appropriate limited purpose. He allowed the jury to be instructed as if Jacobson were under arrest before the acts giving rise to the aggravated

battery charge against petitioner even took place. Such instructions allowed the jury to infer that Jacobson was under arrest for the uncharged misconduct at the time of the charged conduct, the battery of Officer Cox. He permitted, without objection, the state to deliver a summation predicated in the main on the uncharged misconduct evidence. And, most critically, he did not, contrary to the admonition of the Committee Note to I.P.I. - Criminal 3d, § 3.14 (1992), ensure that the jury was instructed on the limited purposes for which uncharged misconduct evidence might be used.

Had counsel, at a minimum, ensured that the jury was instructed on the limited purpose under Illinois law for which the evidence could be admitted, the court would have been obliged to so instruct the jury. I.P.I. - Criminal 3d, § 3.14; *People v. Hendricks, supra.* Had counsel ensured that the jury was properly instructed, there then would not have been a " 'reasonable likelihood' ", *Estelle v. McGuire, supra,* 116 L.Ed.2d at 400, the jury would have construed the uncharged misconduct evidence as "propensity evidence pure and simple." *Id.* cf. *Boyde v. California, supra,* 494 U.S. at 380; *Parker v. Randolph supra,* 442 U.S. at 73.

This term in *Lockhart v. Fretwell, supra,* 61 L.W. at 4157, the Court made clear that the focus of the prejudice prong of the *Strikland* test is on the "fairness of the adversary proceeding" and whether "the result of the trial [is] unreliable. . . . " See also *Nix v. Whiteside,* 475 U.S. 157, 186-187 (1986) (Blackman, J., concurring in the judgment). In this case, the jury had no choice but to view the uncharged misconduct evidence as propensity evidence. The only witnesses to the actual circumstances

giving rise to the charge of aggravated battery for which petitioner was convicted were the two officers and petitioner and his wife. The uncharged misconduct evidence as propensity evidence was central to the prosecution's case. That use gave unfair assistance to the police officer occurrence witnesses as the expense of the defense occurrence witnesses, Jacobson and Lenora.

Therefore, unlike *Estelle v. McGuire, supra,* it is reasonable to conclude not only that the uncharged misconduct evidence was used as propensity evidence, it is reasonable to conclude that counsel's error in permitting it to be used as propensity evidence created the likelihood that petitioner would be convicted of the charged offense. That result is unreliable. *In Re Winship, supra; Jackson v. Virginia, supra;* Kalven and Zeisel, *supra.* That result casts doubt on what should be the overriding imperative of the criminal justice system, to ensure that an innocent person has not been convicted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 3, 1993

Mr. John H. Bisbee
Attorney at Law
437 N. Lafayette St.
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No. 74604 – People State of Illinois, respondent, v. Michael Jacobson, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 25, 1993.

APPENDIX B

NO. 4-91-0921

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL JACOBSON, Defendant-Appellant.	Appeal from Circuit Court of Mason County No. 90CF71 Honorable Fred W. Reither, Judge Presiding. (Filed September 2, 1992)

ORDER

On November 14, 1991, the circuit court of Mason County entered judgment on a jury verdict finding defendant Michael Jacobson guilty of aggravated battery (Ill. Rev. Stat. 1991, ch. 38, par. 12-4(b)(6)). Defendant was subsequently sentenced to 2 years' probation, ordered to pay restitution and serve 120 days in the county jail, and fined $1,000 plus court costs. Defendant raises numerous issues on appeal. As trial counsel failed to preserve most of the issues he raises by objection at trial and inclusion in the post-trial motion, defendant now maintains plain error resulted which, at least cumulatively, requires grant of a new trial. He also asserts that trial counsel's failure to raise and preserve these issues constituted ineffective assistance of counsel. We disagree and hold that any error

which occurred failed to constitute plain error either singly or when compounded by other error. Defendant was not deprived of effective assistance of counsel. We affirm.

Defendant challenges the sufficiency of the evidence and maintains that plain error occurred when (1) evidence of a prior bad act was admitted at trial; (2) the prosecutor allegedly made improper comments in closing argument; (3) the prosecutor cross-examined him regarding his videotaped testimony in preparation for trial; (4) the court instructed the jury on offenses with which he was not charged; (5) the court quashed a subpoena directing the prosecuting attorney to appear as a defense witness; and (6) the prosecutor failed to investigate his allegation he was battered by the police.

Taken with the case is a motion by defendant to supplement the record with a purported bystander's report concerning a hearing on an *in limine* motion by the State to prevent defendant from introducing evidence of the work history of Officer Larry Seward, an occurrence witness. The procedure for presenting a bystander's report where, as here, no verbatim transcript of a hearing is available is set forth in Supreme Court Rule 323(c) which states:

> "If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 14 days after the notice of appeal is filed. Within 28 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter,

> the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal." 134 Ill. 2d R. 323(c).

The purported bystander's report presented here contains the separate recollection of the presiding judge, the prosecutor, and trial defense counsel as to the court's disposition of the motion. The document is then signed by each of those persons. The judge stated that he indicated he was "inclined" to grant the motion when defense counsel indicated he was not going to proceed with that type of proof, whereupon the "matter became moot." The two attorneys stated they understood the court indicated it was going to grant the motion. Supreme Court Rule 323(c) places the responsibility upon the court to "settle, certify, and order filed" any bystander's bill. (134 Ill. 2d R. 323(c).) The court did not do that here. Rather, the document contained the various versions of the occurrence and all signed it without any court certification. Accordingly, we deny the motion to supplement the record with this document.

The evidence at trial showed that in the early hours of September 8, 1990, defendant was arrested for the offense of aggravated battery. On September 13, 1990, the State filed an amended information charging defendant with committing aggravated battery when allegedly he "knowingly caused bodily harm to Gregory Cox, in that he pushed, shoved, and struck Gregory Cox in the Chest

and body with his hands, causing a chip fracture of [Cox's] nose, knowing Gregory Cox to be a police officer engaged in the execution of his official duties."

At trial, it was undisputed that on the night of defendant's arrest he and his wife, Lenora, had been participating in the activities of the "Oktoberfest" celebration which was taking place in the City of Havana over the weekend of September 7 through 10, 1990. The Jacobsons worked at the beer tent serving beer until approximately 11:30 p.m., at which time they, along with another couple, went to a restaurant lounge to drink a beer. Soon after arriving at the restaurant defendant wanted to leave, and after some degree of protest from Lenora, the Jacobsons left the restaurant and began walking to their home. The events that followed were disputed at trial.

The State's first witness, Timothy Hockett, testified regarding the events which led Deputy Gregory Cox and Officer Larry Seward to stop the Jacobsons on their walk home. Hockett testified that at approximately 11:30 p.m. on September 7, 1990, he was sitting on the "roll plane platform," across the street from the sheriff's office, with another man named Lorenzo. He observed a man and a woman arguing while they were walking down the north side of Market Street. Hockett stated he observed the woman yell at the man and fall to the ground after the man struck her. The woman got back up on her feet and struck the man twice in the stomach. The man then grabbed the woman, struck her and she fell again to the ground. Hockett testified the couple was 20 yards from where he was standing and he had a clear view of them. Hockett stated he immediately reported the incident to the sheriff, and he observed two police cars stop the

couple whom he reported as fighting. Hockett described the man as six feet tall or more, dark hair and slim, and the woman as five feet five inches to five feet eight inches tall, with "dirty blonde," shoulder-length hair. Hockett stated that the couple he saw fighting was the same couple stopped by the police. Hockett was not asked to make an in-court identification of defendant as the man he saw that night.

On cross-examination, Hockett admitted that in a sworn deposition he had previously stated that on the night of the incident he did not leave his trailer home until approximately 12:30 a.m. He also stated in his deposition that the couple each had a cup of beer in their hand, and the woman had brunette color hair.

Officer Seward testified that he had been employed with the Havana police department for 3 1/2 years and had 20 years of law enforcement experience. On the evening of September 7, 1990, he was in uniform and on foot patrol at the Oktoberfest. At approximately 11:45 p.m., while standing with Cox, he received a dispatch indicating a man was hitting a woman on the 100 block of East Market Street, which was approximately 2 blocks from where they were standing. Seward stated he and Cox went to his police car, and at that time Cox was dressed in plain clothes, but hanging from his belt were handcuffs, a holster and gun, a sheriff's badge, and a police radio. Seward stated he drove the police car and Cox sat in the passenger side. When they entered the intersection of Broadway and Market he slowed down the police car and observed five people laughing. Seward and Cox determined these people were not those they were looking for. He proceeded driving east on Market Street and

observed a man and woman, who he later learned were defendant and Lenora, and he and Cox heard the woman sobbing or crying. He drove past the Jacobsons, and then drove back toward the Jacobsons after they determined no other couple was in the vicinity. They heard the woman still crying so he activated the emergency lights and they both exited the car and stopped the Jacobsons.

Seward testified that Lenora was bleeding around the mouth and chin and Cox, who was also an emergency technician (EMT), believed she needed sutures. Seward testified that defendant was belligerent and used obscene language when he and Cox offered to call an ambulance or drive Lenora to the hospital. Seward stated defendant asked them to give Lenora and him a ride to their home so he could drive Lenora to the hospital. Seward also stated that at that time Officer Ray of the Havana police was present and he told Ray that the woman did not make any charges against the man so they were going to drive them home. Seward claimed that Lenora was the first to get in the rear passenger seat of his police car; where she sat on the middle of the seat and defendant followed after. Seward testified that on the drive to the Jacobsons' home defendant twice denied hitting Lenora without being questioned about it; and defendant was belligerent and used obscene language when Cox asked them how to spell their names. Defendant asked Cox who he was and Cox informed him he was a deputy sheriff. Seward stated that defendant answered all of the questions directed to Lenora.

Seward further testified that he parked his police car in front of the Jacobsons' home and Cox got out of the car and opened the rear passenger seat door, leaving the

front passenger door opened. Defendant exited the car first and while Lenora was still in the car Seward turned to her and stated that if she needed help that night she should call them. Seward stated that upon hearing this defendant got angry and using obscene language he yelled "you don't know who I am," and "you people are just trying to prove I hit my wife." Defendant then "straight armed" Cox in the chest as he was standing between the open front and rear passenger doors. Cox bounced off the front passenger door and defendant again "straight armed" Cox in the chest. Seward testified he got out of the police car, taking his flashlight with him. Seward observed defendant then grab Cox high on the left shoulder or neck and slam Cox's head on the roof of the car. Seward stated at that time he was coming from around the rear of the police car and he told defendant he was under arrest for aggravated battery. Seward claimed that as he approached defendant, defendant attempted to punch Seward and Seward blocked the punch with his flashlight. Seward stated he then punched defendant in the face, knocking him to the ground.

Seward testified defendant was difficult to handcuff and Officer Ray assisted in handcuffing the defendant. Defendant was brought to the hospital and then to the jail. On cross-examination, Seward admitted having numerous short-term jobs in the field of law enforcement over the past 20 years. Seward stated that at the time the incident occurred he believed defendant had hit his wife. In addition, Seward stated he was named as a defendant in a Federal court suit filed by defendant.

Officer Ray testified corroborating Seward's testimony concerning the difficulty in placing defendant in

handcuffs following the incident. Ray stated while on patrol, he received a dispatch from Seward indicating that an officer needed assistance and Seward's voice was "real excited, sort of high pitch something that [he rarely heard] in Officer Seward's voice." Ray also stated that Cox's voice during the dispatch was "very excited. He sounded like he was out of breath, and also high-pitched voice." Officer Ray testified that in order to put defendant in the rear driver's side seat of Seward's car he had to move a briefcase belonging to Officer Noble.

The State presented evidence from the EMT working at the hospital who examined Cox after the incident. The EMT testified Cox had redness and a deformity of the nose and forehead, and a welt across the left side of his chest. On cross-examination the EMT denied not liking defendant, who at that time was employed as the comptroller at that hospital. The EMT admitted stating in an earlier deposition that defendant was making decisions that would reduce his salary. On redirect, the EMT testified that defendant's decisions actually increased his salary.

Deputy Cox testified he was 5 feet 9 inches, weighed 121 to 122 pounds, and was employed with the Mason County sheriff's department. Cox stated he knew defendant when Cox was employed at the hospital as an EMT. Cox testified he also was named as a defendant in a Federal civil suit filed by defendant. Cox corroborated the testimony of Seward as to the chain of events the evening of defendant's arrest and reiterated that defendant was angry, belligerent and used obscene language. Cox stated that as he was standing between the front and rear doors of the police car in front of the Jacobsons'

home, defendant became angry and pushed him in the chest twice, and as Cox turned to the right defendant hit him on the left upper shoulder and neck, knocking his face against the roof of the police car. Cox stated he did nothing to cause the incident or provoke the defendant into striking him. Cox claimed the knock in the head stunned him and when he came out of it he observed Seward struggling to handcuff defendant.

On cross-examination, Cox admitted that prior to the incident he had fractured his nose three times. Cox also stated that at the time of the incident he had "no reason" to believe defendant hit his wife.

The first defense witness was Lenora Jacobson and she testified that when she and defendant were at the restaurant lounge on the night of the incident she did not want to leave when defendant wanted to go home. Lenora claimed they "discussed" it and decided to go home around 11:45 p.m. Lenora denied arguing with defendant on their walk home and she claimed she tripped on the sidewalk and hit her chin on the pavement. Lenora testified that when the police stopped defendant and her, defendant did not use obscene language and he was not belligerent at that time or at any other time that night. When Cox and Seward gave them a ride home, defendant asked Cox who he was and spelled their names as requested by Cox. Lenora stated that while she and defendant were both in the police car, Seward told them if they needed anything to call. Lenora stated that Cox opened the rear passenger door, she got out first, and Cox began helping her out of the car. Defendant then got out of the car behind her and attempted to put

his arm around her and the next thing she knew defendant was standing against the police car with his hands up asking what was going on.

Lenora testified that Seward came around the car and hit defendant in the face with a long black object. Lenora claimed defendant never pushed or hit Cox. On cross-examination, Lenora admitted saying in an earlier deposition that she and defendant had a "disagreement" at the restaurant lounge on the night of the incident. She also stated that during this "disagreement" their voices were raised at times. Lenora denied that defendant hit her that night. She also denied seeing a briefcase in the rear driver's side seat of Seward's police car. Lenora admitted she did not actually see how Cox pushed defendant up against the car, but in her earlier deposition she had assumed Cox pushed defendant with his hands.

Deputies Bonnett and Barnes also testified, stating that on the night of the incident they were sitting in their police car in the sheriff's parking lot facing south and they observed a man and woman walking east on Market Street. The woman was walking a few feet behind the man. Both deputies stated they did not observe the couple arguing or the man hit the woman. Deputy Barnes testified that the couple he observed that night was the Jacobsons and that Cox told him in the hospital that defendant hit him in the nose. Deputy Bonnett did not identify the couple as the Jacobsons, but he had been told that they were in fact the Jacobsons.

Deputy Yourell testified he took pictures at the location where Lenora allegedly fell. There was a bloodstain on the sidewalk, but the stain was not tested for blood

type. Four and one-half feet from the bloodstain was an elevated section of the sidewalk where the highest peak was one inch. Officer Ray testified again and produced the official flashlight from Seward's police car. Lenora then testified that the flashlight could have been the black object Seward allegedly used to hit defendant in the face. An X-ray technician testified that on the night of the incident he took X rays of both defendant and Cox, and Cox told him defendant hit him in the nose. The emergency room doctor who treated both defendant and Cox on the night of the incident testified defendant had facial injuries, abrasions, and marks on his arm. The doctor testified Cox complained of being hit in the nose and left anterior chest. The doctor admitted that in his deposition Cox's injury most likely was caused by a fist.

Finally, defendant testified he was 34 years old and was employed at the Mason District Hospital as comptroller since February 1990. Defendant stated he and Lenora were married just a few months prior to the incident. Defendant stated he had approximately seven or eight beers that night, and he was six feet four inches, 220 pounds. Defendant denied having any argument with Lenora at the restaurant lounge, and he denied hitting her. Defendant stated that on their walk home Lenora tripped on a raised area of the sidewalk and fell on her chin. Defendant denied using obscene language with Cox or Seward and denied being angry or belligerent that evening. Defendant stated he asked Cox and Seward to drive them home so he could drive Lenora to the hospital, and Seward let defendant in the rear driver side door, and Cox let Lenora in the rear passenger side door. Defendant gave a similar account of the conversation on

the drive to their home as Lenora, and he denied using obscene language. Defendant testified that while on the drive home he told Lenora that he believed Cox and Seward thought he hit her.

Defendant stated that when they arrived at their home Lenora exited the passenger side door first and when defendant followed and attempted to put his arm around Lenora, Cox "tackled" him against the police car door. Defendant stated he then got hit across the upper part of his nose and face. Defendant stated the next thing he remembered he was on the ground and his hands were cuffed behind his back. Defendant claimed he got picked up by his handcuffs and thrown in the backseat of a police car.

On cross-examination, defendant stated that at the time of the incident he could bench press 300 pounds. Defendant stated that as a result of the arrest he was placed on an involuntary leave of absence at his work, and if he was convicted he could lose his job. Defendant admitted he was upset at the restaurant lounge but denied he was angry because Lenora was allegedly flirting. Defendant admitted to being "a little bit" angry with Lenora on the walk home.

Initially, we discuss defendant's contention that the evidence was insufficient to prove defendant's guilt beyond a reasonable doubt. Defendant concedes that the evidence adduced from the four occurrence witnesses, Cox, Seward, himself and Lenora, was equally balanced regarding the occurrence of the alleged aggravated battery, and standing alone is sufficient to support a verdict

of guilty. However, defendant claims that if the prosecution had not been allowed to allegedly place a greater emphasis on the "wife beating innuendo" than on the elements of aggravated battery, the evidence would have been so improbable as to require a reasonable doubt as to defendant's guilt. We disagree.

The law is well settled that when considering a challenge to the sufficiency of the evidence "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) (*Jackson v. Virginia* (1979), 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789; *People v. Collins* (1985), 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277.) Defendant maintains that absent the evidence concerning his hitting his wife, a reason for his attacking Cox would not be apparent and a reasonable trier of fact would be required to have a reasonable doubt of his guilt. We do not agree. The jury was the judge of the credibility of Cox and Seward (*People v. Eyler* (1989), 133 Ill. 2d 173, 191, 549 N.E.2d 268, 276, *cert. denied* (1990), ___ U.S. ___, 112 L. Ed. 2d 174, 111 S. Ct. 215) and their testimony was sufficient to support the verdict. Defendant's contention that the testimony of defendant's attack upon his wife adds strength to the legal sufficiency of the State's case weakens his subsequent argument that this evidence should not have been admitted as the contention concedes that the evidence does tend to prove that defendant battered Cox.

Most of the other claims of error by defendant are raised for the first time on appeal. Ordinarily, failure to

object and raise the alleged error in a post-trial motion results in a waiver of the error for purposes of appeal. (*People v. Enoch* (1988), 122 Ill. 2d 176, 522 N.E.2d 1124.) However, Supreme Court Rule 615(a) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." (134 Ill. 2d R. 615(a).) Under the plain error doctrine, alleged errors normally considered waived can be considered "when the evidence of guilt is closely balanced, or when the error denied the defendant a fair trial. [Citations.] Constitutional errors may be deemed harmless if it can be shown that the error was harmless beyond a reasonable doubt." (*People v. Shields* (1991), 143 Ill. 2d 435, 446, 575 N.E.2d 538, 543.) Before invoking the plain error doctrine, it is proper to determine if error occurred at all, and if not, there is no need to determine whether an alleged error has been waived. *People v. Wade* (1989), 131 Ill. 2d 370, 546 N.E.2d 553.

Defendant's next contention is twofold. First, defendant maintains that the evidence that he struck his wife should not have been admitted because it was not sufficiently probative of any matter other than to show he had a propensity to commit the offense of aggravated battery. Second, even if the evidence was admissible the court erred in failing to instruct the jury on the limited purpose of the evidence. From the outset, we note that defense counsel neither objected to the evidence, raised the admission of the evidence as error in the post-trial motion, nor offered a limited use instruction.

In *People v. Hendricks* (1990), 137 Ill. 2d 31, 560 N.E.2d 611, the Illinois Supreme Court stated that the reason

prior misconduct is not admissible to prove that defendant's propensity to commit the crime charged is because the prejudicial impact of the evidence outweighs any remote probative value. However, an exception exists when the evidence is probative of "motive, intent, identity, absence of mistake or other material facts in issue even though such evidence discloses prior instances of uncharged misconduct by the defendant." (*Hendricks*, 137 Ill. 2d at 53, 560 N.E.2d at 620.) "The erroneous admission of evidence of other crimes carries a high risk of prejudice and ordinarily calls for reversal," unless "the record affirmatively shows that the error was not prejudicial." *People v. Lindgren* (1980), 79 Ill. 2d 129, 140, 402 N.E.2d 238, 244.

The decision whether to admit evidence of other crimes is within the sound discretion of the trial court. (*People v. Leaks* (1989), 179 Ill. App. 3d 231, 534 N.E.2d 491.) We conclude that the evidence that defendant hit his wife was properly admitted for reasons other than to show defendant's propensity to commit the charged crime and, therefore, we need not determine whether defendant's challenge to the evidence was waived for purposes of appeal.

The State's theory at trial was that defendant, having beaten his wife, was fearful of the police and ashamed of his actions and, therefore, he lashed out verbally and finally physically against Cox when Seward told Lenora to call the police if she needed them. Evidence that defendant struck Lenora was offered not to show defendant's propensity to commit the crime of aggravated battery, but was probative of defendant's state of mind at the time of the incident. Furthermore, evidence of another crime is

admissible when it is inseparably linked to the offense charged like the " 'flip-side' of a phonograph record – the defendant is not free to choose one side without having to take the other." (*Leaks*, 179 Ill. App. 3d at 239, 534 N.E.2d at 495.) When the evidence of another crime and the crime charged is "inextricably intertwined, the act is not extrinsic and the rule relating to 'other crimes' evidence is not implicated." (*People v. Allen* (1989), 184 Ill. App. 3d 438, 449, 540 N.E.2d 411, 418.) Here, evidence that defendant struck his wife was an essential part of the circumstances which led to the incident. Seward and Cox necessarily had to testify to why they stopped the Jacobsons and what happened immediately prior to the incident.

Moreover, evidence of defendant's striking his wife was sufficiently probative of his motive for committing the aggravated battery. Evidence of motive must "at least to a slight degree tend to establish the existence of the motive relied on." (*People v. Stewart* (1984), 105 Ill. 2d 22, 56, 473 N.E.2d 840, 857.) For example, the testimony of Cox and Seward indicated defendant was angry, defensive and believed the officers were suspicious that he hit his wife. Consequently, that evidence was relevant to establishing a motive for defendant to attack Cox after Seward advised Lenora to call them if she needed them. The testimony of Hockett, regarding his observations of a man hitting a woman and the police subsequently stopping that couple, was admissible to establish that defendant had allegedly struck his wife. "Before [evidence of other crimes] may be introduced, it must be shown that the crime or behavior actually occurred and that the defendant committed it or participated in its commission.

Such proof, however, need not be beyond a reasonable doubt." *People v. Summers* (1990), 202 Ill. App. 3d 1, 17, 559 N.E.2d 1133, 1143, *appeal denied* (1990), 135 Ill. 2d 565, 564 N.E.2d 846.

Defendant asks this court to consider depositions or excerpts of depositions taken in preparation for trial but not in evidence, and in particular the deposition of an individual not called as a witness who could have allegedly contradicted Hockett's testimony that he observed the man and woman fighting on the night of September 7, 1990. This court has already denied defendant's motion to supplement the record on appeal with these depositions, which were originally exhibits to defendant's motion to remand to the circuit court for filing and proceedings on a second-amended post-trial motion, which was also denied. Because these depositions were not considered by the jury we cannot consider them on appeal.

Defendant also contends that prejudicial error occurred when the prosecutor attempted to impeach defendant on a collateral matter, by the introduction of evidence that he hit his wife just prior to the incident. As already discussed, evidence that defendant hit his wife is not a collateral matter, and therefore the prosecutor could properly impeach defendant with this evidence. *Collins*, 106 Ill. 2d at 269, 478 N.E.2d at 281.

Defendant maintains that, assuming evidence that he hit his wife was admissible for purposes other than to show he had a propensity to commit the charged crime, the court should have given the jury an instruction on the limited use of that evidence. Defendant notes that Illinois

Pattern Jury Instructions, Criminal, No. 3.14 (2d ed. 1981) (hereinafter IPI Criminal 2d), refers to evidence of other crimes and instructs that the evidence be considered by the jury for the limited purpose for which it was received. Defense counsel neither offered this instruction nor raised the alleged error in a post-trial motion. Defendant contends that the prejudice resulting from no limiting instruction is presumptive and this alone justifies reversal, citing *Hendricks* (137 Ill. 2d at 53, 560 N.E.2d at 621). *Hendricks*, however, concerned the admission of evidence of the defendant's past behavior with models which the Illinois Supreme Court decided had neither a direct link to the crime with which that defendant was charged, nor that defendant's motive for allegedly committing the crime. The *Hendricks* court concluded that the probative value of the evidence was outweighed by the prejudicial effect.

Defendant refers to this court's decision in *People v. Richards* (1978), 64 Ill. App. 3d 472, 381 N.E.2d 307, noting that the committee notes for IPI Criminal 2d No. 3.14, cite to *Richards* for the proposition that "[c]are must be taken to state the proper limited purpose for the evidence." (See IPI Criminal 2d No. 3.14, Committee Note, at 23.) However, *Richards* concerned the giving of IPI Criminal 2d No. 3.14 which incorrectly stated the limited purpose for which the jury was to consider other crimes evidence, and this court reversed that defendant's conviction and remanded for a new trial because the jury was instructed on a theory not supported by the evidence. Moreover, this court concluded that the evidence of guilt was contradicted and closely balanced and, therefore, the instruction error was not harmless.

Ordinarily, failure to object to jury instructions, to offer instructions that correctly state the law, and to raise the issue in a post-trial motion results in a waiver of the alleged error for purposes of appeal. (*Shields*, 143 Ill. 2d at 446, 575 N.E.2d at 543.) However, Supreme Court Rule 451(c) provides that "substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." (134 Ill. 2d R. 451(c).) Here, we conclude the alleged beating by defendant of his wife was so closely related in time to the charged aggravated battery that the interests of justice did not make the failure to *sua sponte* give a limiting instruction plain error.

Defendant also claims that certain alleged improper comments made by the prosecutor in closing argument either individually or cumulatively constitute plain error requiring a new trial. One group of comments concerns the prosecutor's referral to defendant's drinking alcohol the night of the incident. In particular, defendant refers to the prosecutor's following statements in rebuttal:

> "Big guys, tough guys, drinking guys, beat your wife guys who are going to say no one is telling me what to do.
>
> * * *
>
> Look what happened. The defendant, there was a panic. There was over reaction. *The Defendant had been drinking all night*, be [*sic*] in an argument with his wife at Poor Richard's, walking down the road, altercation by the tree." (Emphasis added.)

Defendant maintains the above statements were prejudicial and not supported by the evidence, because the prosecutor implied he was drunk and out of control, which allegedly as an empirical matter is frequently associated with physical abuse of one's wife.

Comment on a matter during closing argument is proper " 'if it is either proved by direct evidence or is a fair and reasonable inference from the facts and circumstances proved.' " (*People v. Mullen* (1990), 141 Ill. 2d 394, 404, 566 N.E.2d 222, 227.) Here, defendant testified that he and Lenora had been serving beer at the the Oktoberfest until the beer tent closed at 11:30 p.m. The Jacobsons undisputably went to Poor Richard's to drink another beer after the beer tent closed. Defendant admitted to drinking seven or eight beers throughout the night. Based on defendant's testimony the prosecutor's comment that defendant had been drinking all night was not improper. Furthermore, although the prosecutor's comparison of defendant to "Big guys, tough guys, drinking guys" may have been only remotely supported by the evidence, any error did not raise to the level of plain error.

Defendant also claims the prosecutor's comments on the evidence that he hit his wife were unduly prejudicial, and in the alternative, exceeded the limited purpose for which they could properly have been admitted. However, defendant failed to object, and none of the alleged improper comments were so prejudicial as to constitute plain error. We note that the prosecutor is given a great deal of latitude in commenting in closing argument, and absent a clear abuse of discretion the trial court's determination of the propriety of the closing argument will not

be disturbed on appeal. *People v. Weatherspoon* (1978), 63 Ill. App. 3d 315, 379 N.E.2d 847.

In particular, defendant claims that the prosecutor on six separate occasions made reference to the allegedly "false, factually unsupported theory that defendant hit his wife." For example, the prosecutor commented as follows:

> "[Officers Seward and Cox] did not know Mr. & Mrs. Jacobson. They received a dispatch or a call, a fight, man and a woman, one hundred block East Market Street. They responded. The call came from the Mason County Sheriff's Department. You heard Timothy Hockett. He is the one that made the call. You heard him testify a big man, blonde headed woman which entered the police car.
>
> * * *
>
> The officers approached the couple in the Lutheran Church parking lot. What is the first thing the officers do? Express concern. Can we help you. Can we call an ambulance. Can we take you to the hospital? Who responds? The defendant. He expressed in cross examination or in direct examination great care and concern for his wife. Yet he does not want to take her to the hospital. He does not want – let me – he does not want the police to take her to the hospital. He does not want an ambulance to take her to hospital. I submit to you ladies and gentlemen there are certain inferences you can draw from that. Did he not want her injuries displayed in public? Did he not want her to be alone with a doctor, an EMT or a nurse who might ask how did this happen? We know how it happened.

> Tim Hockett told us how it happened. The raised sidewalk story, you have to apply the weight to that you deem is appropriate."

In rebuttal, the prosecutor allegedly improperly commented as follows:

> "If you remember the sergeant [in the Hill Street Blues television show] always told the police officers be careful out there. That is because there is danger out there. There is danger every time the police officer gets in his car every day because of people like him [(referring to defendant)]. Big guys, tough guys, drinking guys, beat your wife guys, guys who are going to say no one is telling me what to do.
>
> * * *
>
> I defy you ladies and gentlemen to stand, trip yourself, to fall and hit your chin without your knees or hands coming out. Now don't practice this, but just think about it. There is an involuntary reaction immediately any time that is going to happen. Her chin hits the ground, maybe so, but it was because he knocked her down. Tim Hockett, he saw it all. They would like to make out Tim made this up and he has got the wrong people. Tim said I saw the man and the woman and then the police car came and they got in the police car. We know who got in the police car.
>
> * * *
>
> The officers were doing their duty ladies and gentlemen. A woman was injured, injured at the hands of her husband right over there by the tree just like Tim Hockett told you. Woman was injured and they were trying to help her.

> That was what they were there for, and look what happened. Look what happened. The defendant, there was panic. There was overreaction. The defendant had been drinking all night, be [*sic*] in an argument with his wife at Poor Richard's, walking down the road, altercation over by the tree.
>
> * * *
>
> I submit to you Lenora Jacobson is not a credible witness. She loves her husband. She is going to do what she can to help him. She didn't fall the way she said. I think that is absolutely impossible for that to happen."

Defendant claims the instant case is similar to *Hendricks* (137 Ill. 2d at 55, 560 N.E.2d at 621), where the supreme court concluded that the evidence of that defendant's past conduct with models purportedly admitted to establish motive, was instead used by the prosecutor during closing argument to portray that defendant as having an evil disposition. Notably, the *Hendricks* court concluded that the evidence of defendant's past relationship with models was not probative of that defendant's motive and, therefore, comments on such alleged collateral misconduct were improper.

As already mentioned the State's theory of the case was that defendant was angered and embarrassed by the officer's suspicion that he hit his wife, and consequently, he overreacted by shoving Cox after Seward advised Lenora she could call them if she needed help. The prosecutor's comments regarding Hockett's observations which led the officers to stop the Jacobsons, and the comments on defendant's refusal to allow the officers to

call an ambulance or drive Lenora to the hospital were based on the evidence and were permissible argument.

More questionable are the prosecutor's comments inviting the jury to draw inferences regarding defendant's reasons for not allowing the officers to provide Lenora transportation to the hospital. An inference that defendant hit his wife cannot necessarily be drawn from the evidence, alone, that defendant refused to have the officer's provide transportation to the hospital. However, because there was other evidence that defendant hit his wife, the invited inferences were based on the evidence, and unlike *Hendricks*, the comments were made for reasons other than to show defendant's propensity to commit the crime charged. The prosecutor can argue logical inferences based on the evidence. (*Collins*, 106 Ill. 2d at 277, 478 N.E.2d at 285.) Furthermore, the prosecutor's comments in rebuttal were in response to defendant's theory that Lenora tripped on the sidewalk and injured her chin and was, therefore, permissible argument. An invited response by the prosecutor cannot be relied on as error. *Collins*, 106 Ill. 2d at 277, 478 N.E.2d at 284.

Defendant raises a more serious allegation of improper argument concerning the prosecutor's reference to Seward as a "good cop." For example, in closing argument the prosecutor stated:

> "[Seward] is a good officer, twenty years of experience. No, he didn't take the four hundred hours. All of us who have been, some of us a little older, some are older than me, we all kind of go along in life and we learn that sometimes experience is more valuable than book learning.

> Larry Seward, twenty year cop, he was experienced. He knew what was going on. He is a good cop."

Defense counsel failed to object or raise this as an error in his post-trial motion.

Defendant's claim of error is based upon his theory that the court had allowed the State's motion *in limine* prohibiting introduction of evidence of Seward's work history. Defendant relies upon *Mullen* (141 Ill. 2d at 404, 566 N.E.2d at 227), where the supreme court held plain error had occurred when the State commented on evidence which had been expressly excluded by the court. That court noted that a prosecutor's comments on excluded testimony alone does not necessarily require a new trial, but deemed a new trial necessary there, when there was no evidence to support the comment and the comment was highly prejudicial.

Here, unlike in *Mullen*, under our ruling excluding use of the bystander's report, the record does not show whether the court had prohibited introduction of evidence as to Seward's work record. Moreover, here, even if we determined that the record did indicate that the court had allowed the *in limine* motion, defendant did cross-examine Seward extensively concerning his work history. The testimony revealed that Seward had numerous short-term law enforcement jobs in the last 20 years. The type of officer which Seward had been was not an important issue in the case. Even if the *in limine* motion had been allowed, the prejudice to defendant from the prosecutor's comment was not prejudicial enough to constitute plain error. See *Collins*, 106 Ill. 2d at 76, 478 N.E.2d at 284.

Defendant also claims the prosecutor's comments that Seward was a "good cop" violated his due process rights under *Napue v. Illinois* (1959), 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173. In *Napue*, the United States Supreme Court held that the State's knowing use of false testimony, even as it relates to the credibility of a witness, is a violation of the fourteenth amendment. Defendant admits the present case does not involve false testimony, but claims it is analogous to *Napue* because the prosecutor himself allegedly engineered the exclusion of the evidence of Seward's work history when he knew or likely knew the evidence did not support that statement. Defendant requests this court to take judicial notice of various documents relating to Seward's past work history but this evidence was not offered in the circuit court and we cannot decide the nature of Seward's work history.

Defendant argues that it was plain error for the prosecutor to argue that Seward and Cox had nothing to gain from the outcome of the trial while the Jacobsons stood to lose a lot if defendant was convicted. Defendant neither objected to the comments nor raised the alleged error in his post-trial motion. Defendant concedes that comment on the witnesses' credibility is permissible argument, however, he claims it was improper for the prosecutor to claim Seward and Cox had nothing to gain when a Federal civil lawsuit was pending against both officers, which allegedly could end Seward's career in law enforcement. The evidence at trial indicated that an attorney was provided free of charge to both Seward and Cox to defend in the civil suit and Seward was not suspended as a result of the incident. Cox was no longer employed as a deputy sheriff at the time of the trial and was

working as a correctional officer. Defendant admitted at trial that he was on an involuntary leave of absence from work and he could lose his job if he was convicted. Furthermore, the outcome of the trial would have a bearing on defendant's civil suit against Seward and Cox.

Defendant also makes a general allegation that the prosecutor committed plain error by allegedly "basically argu[ing] that [he] and his wife were both lying because [his] job was at stake and because of the pendency of [a] civil lawsuit" which defendant had brought against the police officers. Defendant relies on *People v. Emerson* (1983), 97 Ill. 2d 487, 497, 455 N.E.2d 41, 45, where the Illinois Supreme Court held that "[u]nless based on some evidence, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper." Unlike *Emerson*, however, here, defendant does not refer to any comments alleging the defense counsel fabricated the defense, or suborned perjury. As already mentioned defendant admitted he could likely lose his job if convicted, and that a civil lawsuit was pending. Any improper inference that the Jacobsons were lying was not objected to or raised in defendant's post-trial motion; therefore, we deemed it waived for purposes of appeal.

Defendant next contends that the prosecutor committed plain error by cross-examining him and Lenora regarding their pretrial meetings with their attorney, and asking whether they videotaped their testimony in preparation for trial. Defendant maintains that line of questioning improperly implied that they rehearsed a

manufactured story. Defendant also maintains that the prosecutor similarly committed plain error by allegedly implying in closing argument that their meetings with their attorney prior to trial were for the purposes of manufacturing a story.

> "The latitude to be allowed on cross-examination and rebuttal is a matter within the sound discretion of the trial court, and a reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant. [Citations.] Generally, any permissible kind of impeaching matter may be developed on cross-examination, since one of the purposes of cross-examination is to test the credibility of the witnesses." (Collins, 106 Ill. 2d at 269, 478 N.E.2d at 281.)

Defendant objected to neither the alleged improper cross-examination nor the alleged improper comments, and failed to raise either error in his post-trial motion.

Defendant claims the cross-examination was a denial of his right to effective assistance of counsel and an infringement of the attorney-client privilege. We disagree. The prosecutor's questions regarding how many times defendant met prior to trial with his attorney and whether he videotaped his testimony did not imply that they necessarily manufactured a defense, and in any event, the jury clearly was aware that defendant had met with his attorney prior to trial. Moreover, the cross-examination did not reveal any privileged attorney-client communications. In addition, any error in the prosecutor's comments in closing argument implying that defendant's attorney was not present at the time of the incident (presumably to control the defendant), or in the comment

inviting the jury to draw an inference as to why Lenora called her attorney before speaking to investigating officers, did not raise to the level of plain error.

Defendant maintains it was plain error for the court to give certain jury instructions which allegedly gave credence to the "false factual predicate" that defendant had beaten his wife and was under arrest for that offense at the time of the incident. The record indicates the court instructed the jury based on IPI Criminal 2d Nos. 24-25.12 and 24-25.20. The instructions given stated:

> "A police officer need not retreat or desist from efforts to make a lawful arrest because of resistance or threat in resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest or to defend himself or another from bodily harm while making the arrest."

See IPI Criminal 2d No. 24-25.12.

> "A person is not authorized to use force to resist an arrest which he knows is being made by a peace officer, even if he believes that the arrest is unlawful."

See IPI Criminal 2d No. 24-25.20.

Defendant claims that by giving the People's instructions, IPI Criminal 2d Nos. 24-25.12 and 24-25.20, the court effectively told the jury that at the point at which defendant was brought to his home, and at the time of battery of Cox, he was under arrest for what the jury had to infer was the beating of his wife. He argues that at the time Cox was alleged to be battered he was not under arrest and giving of the instructions was plain error.

Defendant does not claim the instructions improperly state the law. To preserve for review an alleged error in an instruction, the grounds for the objection must have been specifically pointed out to the trial court so that the court may have an opportunity to consider the correct alleged error. (*People v. Caballero* (1984), 102 Ill. 2d 23, 41, 464 N.E.2d 223, 231-32.) Here, the record is unclear as to whether defense counsel objected to the giving of IPI Criminal 2d No. 24-25.20, and the only objection to IPI Criminal 2d No. 24-25.12 was based on "[r]elevance [and] [p]rejudicial [*sic*]." Although defendant made a vague objection to IPI Criminal 2d No. 24-25.12, his failure to object at all to IPI Criminal 2d No. 24-25.20 and failure to make a specific objection to IPI Criminal 2d No. 24-25.12 results in the waiver of the alleged error which he now raises.

In any event, the giving of the instructions was not prejudicial considering the defense focused significantly on Seward's actions in striking defendant in the face, apparently implying Seward struck him unlawfully. Furthermore, the jury was well aware that defendant was not under arrest prior to the incident because the testimony of both Seward and Cox indicated they did not intend to arrest the defendant for striking his wife, and they drove him home only so that he could bring Lenora to the hospital.

Defendant also claims that the court's order quashing the subpoena directing the prosecutor to testify for the defense was plain error and a violation of his due process rights under *Brady v. Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194. The United States Supreme Court in *Brady* held that as a matter of due process

prosecutors must disclose material evidence favorable to an accused either as to guilt or punishment. The record indicates that defendant failed to raise this error in his post-trial motion.

The record indicates a hearing was held on the State's motion to strike the subpoena. At the hearing defense counsel claimed he intended to call the prosecuting attorney as a witness because shortly after defendant's arrest defendant had a conversation with the prosecuting attorney allegedly requesting a charge be filed against Seward and Cox. The defense counsel refused to reveal what information within the personal knowledge of the prosecuting attorney he wished to question him about. The decision to not allow attorneys who are acting as advocates to testify at trial is within the discretion of the trial court. Moreover, there is no abuse of discretion in refusing to allow the prosecuting attorney to testify where the testimony is not necessary for the offense. (*People v. Rosenberger* (1984), 125 Ill. App. 3d 749, 466 N.E.2d 608.) Here, defendant testified that he went to the prosecuting attorney to make a complaint against Seward and Cox and there is nothing in the record to indicate that the prosecutor could have done anything more than corroborate defendant's testimony. Consequently, the court did not abuse its discretion in granting the State's motion to strike the subpoena.

Defendant claims that because the prosecutor did not testify plain error occurred when the prosecuting attorney brought out in cross-examination that defendant did not pursue the complaint with the mayor or the chief of

police, allegedly implying defendant's version of the conversation was not true. The prosecutor's cross-examination regarding defendant's complaint was a permissible line of questioning in response to defendant's testimony and did not involve the content of the conversation between him and the defendant. In any event, any error did not raise to the level of plain error.

Defendant next contends that it was plain error and a denial of his equal protection rights for the prosecutor to refuse to investigate his claim against Seward and Cox. However, because this was not an issue at trial we cannot now consider it on appeal.

Finally, defendant maintains that his trial counsel's failure to object to the foregoing alleged trial errors was presumptively ineffective in accordance with *United States v. Cronic* (1984), 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039. In the alternative, defendant claims his trial counsel's representation was at the very least constitutionally ineffective under *Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052. The Illinois Supreme Court in *People v. Hattery* (1985), 109 Ill. 2d 449, 488 N.E.2d 513, noted that in some cases the counsel's performance was so likely to have prejudiced the defendant that the prejudice need not be proved, but instead will be presumed.

The Hattery court stated:

> "In a companion case, [(*Cronic*)], the court emphasized that the sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. Where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has

> been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " *Hattery*, 109 Ill. 2d at 461, 488 N.E.2d at 517, quoting *Cronic*, 466 U.S. at 659, 80 L. Ed. 2d at 668, 104 S. Ct. at 2047.

In *Hattery*, the defendant pleaded not guilty to murder and at his trial his appointed counsel in opening statement conceded that he committed the murders and stated that the only issue to be decided was whether that defendant should receive the death penalty. Defense counsel presented no evidence and made no closing argument. Apparently, defense counsel's trial strategy was to show that even though defendant was guilty he did not deserve the death penalty. Nonetheless, the *Hattery* court concluded that because defendant entered a not guilty plea, he was denied effective assistance of counsel when his counsel conceded his guilt.

In *People v. Chandler* (1989), 129 Ill. 2d 233, 246, 543 N.E.2d 1290, 1295, the Illinois Supreme Court noted that a concession of guilt does not constitute *per se* ineffective assistance of counsel, and that the defendant must overcome a high burden before he can forsake the two-part *Strickland* test.

We conclude the instant case does not come within the holding of *Hattery*. Defense counsel's failure to object to evidence that defendant struck his wife was not analogous to conceding his guilt, and in fact could be considered a matter of trial strategy. Defense counsel thoroughly cross-examined the State's witness and presented evidence for the defense. Certainly defense counsel " 'subject[ed] the prosecution's case to meaningful adversarial testing.' " See *Hattery*, 109 Ill. 2d at 461, 488

N.E.2d at 517, quoting *Cronic*, 466 U.S. at 659, 80 L. Ed. 2d at 668, 104 S. Ct. at 2047.

Ordinarily, allegations of ineffective assistance of counsel are evaluated according to a two-part test announced in *Strickland*. Under the *Strickland* test, the defendant must prove (1) "that despite a strong presumption of counsel's professional competence, counsel's allegedly unprofessional acts or omissions in fact were 'outside the wide range of professionally competent assistance,' and (2) 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*People v. Stewart* (1990), 141 Ill. 2d 107, 118, 565 N.E.2d 968, 973, quoting *Strickland*, 466 U.S. at 690, 694, 80 L. Ed. 2d at 695, 698, 104 S. Ct. at 2066, 2068.) The *Strickland* court noted that if it is easier to decide a case on the ground of lack of sufficient prejudice, rather than having to decide whether counsel's representation was constitutionally deficient, a court should do so. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069.

Defendant's allegations of ineffective assistance of trial counsel center on the failure of the trial counsel to preserve the foregoing errors for appeal purposes. However, because we have concluded that defendant's alleged errors either did not exist or were not prejudicial, he has failed to establish the second part of the *Strickland* test, *i.e.*, that but for defense counsel's errors the result of the trial would have been different.

For the above-mentioned reasons, we affirm.

Affirmed.

GREEN, P.J., with STEIGMANN and McCULLOUGH, JJ., concurring.

APPENDIX C

STATE OF ILLINOIS, MASON COUNTY IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	Case No. 90 CF 71
	)	Pltf. Atty. S/A
vs.	)	Def. Atty. Dean Store
Michael Jacobson, Defendant.	)	

(Filed Nov. 14, 1991)

FINAL ORDER

THE DEFENDANT HAVING BEEN CALLED INTO OPEN COURT ON THIS DATE, and;

[ ] 1. The Defendant understandingly waives his right to a jury trial having been fully advised of his right herein;

[ ] 2. The Defendant enters a plea of Guilty without any agreement as to sentence after being informed of the nature of the charge, the minimum and maximum possible penalties provided by law and the consequences thereof for each charge in the Complaint/Information;

[ ] 3. After full admonishment as to his rights, the Defendant enters a plea of Guilty pursuant to the terms of a negotiated plea agreement and the Court finds that there is a factual basis for the pleas and accepts the agreement, after the Defendant is informed of the minimum and maximum possible penalties provided by law and the consequences thereof for each charge in the Complaint/Information;

[x] 4. A sentencing hearing is conducted on this date.

[ ] 5. Other: _____ .

IT IS HEREBY ORDERED:

[x] A. The Court enters a Judgment/Finding of Guilty for the said Defendant and convicts him of the offense of Aggravated Battery as charged in the Complaint/Information, and

[ ] B. Without entering judgment of guilty and with the consent of the Defendant, the Court accepts the Defendant's pleas of Guilty and defers further proceeding and:

a) Places Defendant on Probation for _____ months/years pursuant to Ch.56½, par. 710/1410 of the I.R.S.

b) Places Defendant on Court Supervision for _____ months/years pursuant to Ch. 38, par. 1005-6-1, I.R.S. Defendant subject to Court Supervision conditions.

THE COURT FURTHER FINDS:

[x] 1. The Defendant is sentenced to pay a fine of $1,000 , and is ordered to pay costs of 1,129.75 .

[x] 2. The Defendant is given until Dec 14 1991 , at 10:00 a.m./p.m. to pay fine and costs, and if it is not paid by that date, Defendant must appear at that time in this court and show cause as to why he should not be held in contempt of court for his failure to pay.

[x] 3. The Defendant makes restitution as follows: To Gregory Cox for future medicare Services by _____ 19___ .

[x] 4. A sentence of imprisonment for 120 days/months is imposed on the Defendant, and is to be served at:
[x] a) Mason County jail.
[ ] b) _____

[x] 5. A sentence of Probation/Conditional Discharge for 2 days/months/years is imposed on the Defendant, subject to the conditions set forth in the attached Certificate of Probation/Conditional Discharge which is made a part hereof.

[ ] C. The Court orders ___ be dismissed on motion of People/Defendant/Court, pursuant to plea agreement in case _____.

[x] D. Defendant's appeal rights fully explained pursuant to Ch. 110A, par. 607.

[ ] E. Other: _____.

ENTERED: November 14 1991

Defendant:

/s/ Fred Reither
JUDGE OF THE EIGHTH
JUDICIAL CIRCUIT

IN THE CIRCUIT COURT OF THE EIGHTH
JUDICIAL CIRCUIT
MASON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
Plaintiff,	)	Case No. 90-CF-71
VS.	)	(Filed Nov. 14, 1991)
Michael Jacobson,	)	
Defendant	)	

ORDER FOR PROBATION/CONDITIONAL DISCHARGE

THE CAUSE coming on for sentencing hearing in aggravation and mitigation having been held/waived and the Defendant having been convicted/entered a plea of guilty to: Aggravated Battery

IT IS ORDERED that the Defendant be sentenced to Probation/Conditional discharge for a period of 24 months terminating on 11/14/93, served, subject to the condition that he (1) shall not violate any criminal statute of any jurisdiction; (2) report and [sic] and/or appear in person before the Probation Officer on such schedule as required by said Officer; and (3) refrain from possessing a firearm or other dangerous weapon.

IT IS FURTHER ORDERED that the Defendant shall comply with such additional conditions of Probation/ Conditional Discharge as are checked below:

x 1. Pay a fine of $1,000 and court costs of $1,129.75 , by _____ to the Circuit Clerk of this Court.

x 2. Serve a term of 120 days imprisonment in the Mason County Jail, with the imprisonment to be at the following dates and times.:

Stated to December 14, 1991 at 9:00 AM

x 3. Make restitution to the Circuit Clerk for the following named persons in the amounts specified _____ by Gregory Cox - future medical expenses by reason of this illegible

___ 4. Work or pursue a course of study or vocational training.

___ 5. Undergo medical or psychiatric treatment or engage in counseling at _____.

___ 6. Submit to a breathalyzer test or urine analysis upon request of the Probation Department to detect the presence of alcohol or drugs any [sic] pay the fee or costs of such test.

x 7. Permit the Probatation Officer to visit him at his home or elsewhere.

___ 8. Refrain from using any drug or substance prohibited by law or any alcoholic beverage or enter any place where the sale of alcohol is their principal business.

x 9. Shall not leave the State of Illinois without the permission of the Probation Officer.

x 10. Keep the Probation Officer advised of his place of residence and employment at all times, advise

the Probation Officer immediately of any change therein.

__x__ 11. Make true answers to all questions asked by the Probation Officer or this Court during the period of Probation.

____ 12. Shall perform _____ hours of public service work under the direction of the Probation Department.

____ 13. OTHER: _____

_____

In the event this Probation/Conditional Discharge should subsequently be revoked, time served on this Probation/Conditional Discharge shall not be credited by the Court against any sentence of imprisonment or periodic imprisonment subsequently imposed.

ENTERED this 14 day of November , 1991 .

I hereby acknowledge receipt of the above Order.

_____ /s/ Fred Reither

DEFENDANT JUDGE

cc: State's Attorney✔ Sheriff
Defendant✔ Defendant's Attorney✔

Probation Office

Judge Fred Reither✔

11-14-91

APPENDIX D

No. 4-91-0921

IN THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Eighth Judicial Circuit Mason County Case No. 90-CF-71
Plaintiff-Appellee,	)	
-v-	)	
MICHAEL JACOBSON,	)	Honorable Fred Reither Judge Presiding
Defendant-Appellant.	)	

MOTION TO REMAND TO CIRCUIT COURT FOR FILING OF AND PROCEEDINGS ON A SECOND AMENDED POST TRIAL MOTION

Defendant-Appellant, hereafter defendant, by his attorneys, hereby moves the court pursuant to Supreme Court Rules 366 (a) and 615(b) (2) to enter an order remanding the above captioned matter to the Circuit Court for the Eighth Judicial Circuit, Mason County, Illinois, for the limited purpose of permitting defendant to file a second amended post trial motion and to proceed thereon. As reason for so moving, defendant states as follows:

1. Defendant was found guilty on September 20, 1991, after trial by a jury of aggravated battery as defined

by *Ill.Rev.Stat.* Ch. 38 §12-1(a) and final judgment was entered against him on November 14, 1991, pursuant to which he received a $1,200.00 fine, 120 days in the Mason County Jail and was required to pay costs of $1,129.75.

2. Defendant filed a timely notice of appeal December 13, 1991.

3. Defendant's new counsel who is also defendant's counsel as plaintiff in that certain civil action which has been filed in the United States District Court for the Central District of Illinois, Springfield Division, entitled Jacobson v. Cox, et al., No. 90-3259, said action voluntarily dismissed without prejudice in the wake of defendant's conviction, has reviewed the record and proceedings in this case with the view in mind of submitting defendant's brief but has, to his profound regret and not in the spirit of second guessing trial counsel, come to the conclusion that there were errors in the trial proceedings which may not have been appropriately preserved either by contemporaneous objection or by sufficiently specific designation in the post trial and amended post trial motions, which motions are attached as Exhibit A.[1]

4. Inasmuch as the post trial and amended post trial motions did not alert the circuit court to those various errors, some of a constitutional dimension, it seems appropriate and in the interests of reaching a correct and just result that said errors be brought to the attention first of the circuit court thereby perhaps obviating the necessity of an appeal or, if not doing that, perhaps obviating

---

[1] All exhibits to this motion are attached separately bound and are being submitted contemporaneously herewith.

the need of post conviction proceedings after any affirmance by this court on direct appeal of defendant's conviction.

5. The essential factual context from which the controversy presented in this appeal arises consists of the following:

> a. Defendant and his wife were walking to their home in Havana, Illinois shortly before midnight Friday, September 7, 1990, in the aftermath of that community's "Oktoberfest" celebrations when defendant's wife tripped and fell and police officers situated elsewhere claimed they received a report that a man was beating a woman in the general vicinity where plaintiff and his wife were walking and his wife had fallen.
>
> b. The police officers proceeded to the scene and observed defendant holding his wife.
>
> c. Defendant responded to inquiries of the police officers concerning his wife that she had fallen, whereupon the police officers offered defendant and his wife a ride to their home which the defendant and his wife accepted, the defendant not being under arrest or threat of arrest or other compulsion.
>
> d. When they arrived at defendant's home shortly after midnight, September 8, 1990, the officers let defendant and his wife out the back door of the police car at which time an altercation developed between defendant and the police officers from which altercation defendant was severely injured and the officers claimed defendant committed aggravated battery with respect to them.

The foregoing is evidenced by Exhibit B, attached hereto.

6. This case, therefore, does not present the typical aggravated battery situation deriving from a defendant's physical altercation with police officers in attempting to resist arrest or incarceration, it being clear that defendant was not under arrest or threat of arrest at the time the altercation developed, having merely been given a ride home with his wife.

7. The specific points which were not raised in the defendant's post trial and amended post trial motions but should be raised prior to any direct appeal in order to permit plenary consideration by the circuit court and this court on direct appeal as necessary are the following:

a. Defendant was deprived the effective assistance of counsel in that his lawyer permitted the prosecution to establish and argue that defendant had been drinking "all night", as evidenced by Exhibit C attached hereto, whereas in fact the evidentiary record established both at the preliminary hearing and in depositions in the aforementioned civil action entitled Jacobson v. Cox, et al., to which the prosecution and defendant's trial counsel had complete access, showed that the officers considered defendant to have been sober, as evidenced by the preliminary hearing and deposition transcripts attached hereto as Exhibit D.

b. Defendant received the ineffective assistance of counsel in that his lawyer failed to call a witness, one Lorenzo Smith, to testify that the circumstances used by the officers to support their theory that defendant was drawn to their attention by reports they received of someone striking a woman occurred on Saturday night,

September 8, 1990, not Friday night, September 7, 1990, as the prosecution established through the witness Timothy Hockett who was with said Lorenzo Smith as a carnival worker at the Oktoberfest carnival and who witnessed the same event as did Lorenzo Smith, a copy of said transcript is attached hereto as Exhibit E.

c. Defendant received the ineffective assistance of counsel in that his trial counsel failed to attempt to impeach the witness Timothy Hockett with his prior inconsistent statement that the events he witnessed involving a man beating a woman occurred on late Saturday, September 8, 1990, and not Friday night, September 7, 1990, a copy of such statement attached hereto as Exhibit F.

d. The admission into evidence of testimony, as evidenced by Exhibit G attached hereto, which permitted the creation in the jury's mind of the false idea that defendant had beaten his wife was error[2] under common law principles and denied defendant due process under the United States and Illinois Constitutions and to the extent such evidence was admitted without appropriate objection or preservation of the record was the result of the ineffective assistance of counsel where (i) defendant was never charged with having hit his wife, (ii) the police officers knew they did not have probable cause to charge defendant with having hit his wife as evidenced by Exhibit H attached hereto,[3] (iii) both defendant and his

---

[2] The prosecutor's argument to this effect is treated in paragraph 7i infra.

[3] See also Seward's testimony, Exhibit B, pp. 37-63.

wife emphatically denied that defendant had hit her, (iv) the supposed striking of defendant's wife was removed both in time and place from the circumstances of the alleged aggravated battery, and (v) the suggestion that defendant might have hit his wife was prejudicial far in excess of any probative value it might otherwise have had.

e. Defendant was denied due process under the United States and Illinois Constitutions where the prosecutor first secured either an order or agreement in limine precluding defendant from introducing evidence that the principal police officer involved, one Larry Seward of the Havana Police Department, had lost approximately 11 previous police positions for various misconduct including physical beatings of arrestees and other members of the public and acts of dishonesty, and then, having precluded admission of such evidence, argued in closing to the effect that Larry Seward had been a cop for 20 years and was a "good cop", such evidence being false and known to the prosecutor to be false in violation of the principles enunciated in *Napue v. Illinois*, 360 U.S. 264 (1959). Portions of the transcript of the prosecutor's closing argument together with deposition and documentary evidence relative to Seward's employment history are attached as Exhibits I and J respectively.

f. Defendant was denied due process under the United States and Illinois Constitutions in that he was not permitted to call the prosecuting attorney, Alan Tucker, as a witness to establish the fact that on the Monday morning, September 10, 1990, following the Friday,

September 7, 1990, when the circumstances giving rise to his arrest had occurred, he attempted to report those circumstances to said state's attorney who in fact did talk to defendant for some period of time and confirmed to the defendant that officer Seward had struck defendant in the area of defendant's forehead and nose bridge with his service flashlight but refused to file charges against said officer as evidenced by Exhibit K attached hereto consisting of excerpts from the depositions of Michael Jacobson and Alan Tucker.

g. The prosecution of the defendant under the circumstances of this case deprived defendant of equal protection of the laws under the United States and Illinois Constitutions.

h. It was error and a violation of defendant's Sixth Amendment right to the assistance of counsel for the prosecutor to question the defendant and argue respecting defendant's conferences and meetings with his attorney and the preparation for trial, as evidenced by Exhibit L attached hereto, and, to the extent defendant's counsel failed to object to such questioning, defendant received the ineffective assistance of counsel.

i. It was error under Illinois common law principles and a denial of due process under the United States and Illinois Constitutions for the prosecutor to make the false final argument about the general danger confronted by police officers in the face of "[b]ig guys, tough guys, drinking guys, beat your wife guys, guys who are going to say no one is telling me what to do" like the defendant, as evidenced by Exhibit M attached hereto, when such argument was both

unsupported by the evidence adduced at trial and prejudicial in the extreme and, to the extent said argument to the effect that defendant was impaired by alcohol and had beaten his wife was made without objection, the argument was the result of defendant having received the ineffective assistance of counsel in permitting even the suggestion that defendant was impaired by alcohol to be entered on the record when the police officers themselves believed him to have been sober and knew they had no basis to charge him with hitting his wife.

j. It was error under Illinois common law principles and a denial of due process for the court to have given People's instruction numbers 13 and 14, attached hereto as Exhibits N and O respectively when such instructions specifying that the altercation between defendant and the police officers developed as a result of defendant's resistance to an arrest when the evidentiary record in the criminal trial and the deposition testimony of the arresting officers themselves demonstrate that at the time the altercation developed, defendant was not under arrest or threat of arrest whereby said instructions were prejudicial as follows:

(i) They were antithetical to the evidentiary record and contrary to defendant's theory of the case, namely that the police officers, particularly officer Seward, in apparent frustration at the lack of probable cause to arrest defendant for their incorrect suspicion that he had struck his wife, assaulted defendant when they arrived at his home, thereby creating the false predicate for the aggravated battery charge.

(ii) Said instructions created the false impression that defendant was under arrest for having struck his wife when that was neither the legal fact nor the actual fact, said instructions exacerbated by the prosecutor's closing argument as set forth in sub-paragraph i, supra. See Exhibit B hereto also.

k. To the extent defendant's trial counsel failed to either object to said instructions and to the extent he failed to adequately specify the giving of said instructions as error in the post trial and amended post trial motions, defendant received the ineffective assistance of counsel which permitted the case to be tried on a false factual predicate, to wit, the predicate that the circumstances of the altercation between defendant and the police officers resulted from defendant's attempt to resist arrest for having struck his wife when that, as a matter of fact, simply was not the case. See Exhibit B hereto.

8. The foregoing are substantial issues suggesting the real possibility of a miscarriage of justice which should be allowed the benefit of a full hearing in the circuit court in order for the circuit court to appraise defendant's proof in support of his allegations and to grant or deny a new trial on the basis of said proof and thereby permitting development of a record which, if a new trial is still denied after consideration by the trial court of the matter set forth herein, this court will be able to consider on direct appeal important and substantial issues which have not thus far been preserved.

9. It is in the interests of justice for this court to remand the above captioned matter to the trial court for consideration of defendant's second amended post trial

motion for the reason that as the matter now stands, this court will only be able to review the errors alleged in the amended motion for a new trial, which errors while being broadly stated in some instances nevertheless might not permit argument on appeal of many of the discrete issues set forth in this motion and none of the issues going to the ineffective assistance of trial counsel, which issues must, at some time, be considered in order that this case be fully and properly considered and that the final judgment reflect a correct application of the legal principles to a proper development of the evidentiary record.

10. It would not be prejudicial or otherwise contrary to the interests of the state for the court to remand this matter as herein prayed because it would serve the interest of judicial economy in permitting all the issues to be addressed by the circuit court on the post trial motion and then heard, if necessary, by this court on direct appeal without the necessity of a post trial procedure, which procedure will be not only necessary but inevitable in the event defendant is not allowed to develop a record respecting the issues herein raised.

11. It would not be prejudicial to the interests of the state and would, therefore, be in the interests of justice for this court to remand the matter as herein prayed for the further reason that as held in *Berger v. U.S.*, 295 U.S. 78, 88 (1935), it is the obligation of the prosecution in a criminal case, "not that it shall win a case, but that justice shall be done", and the record in this case strongly suggests that justice has not been done for reasons which have not been fully and adequately preserved as set forth herein in paragraph 7.

WHEREFORE, defendant-appellant prays the court to enter an order remanding the above captioned appeal to the circuit court for further proceedings on a second amended post trial motion for the reasons aforesaid.

Respectfully Submitted:

LAW OFFICES OF
JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455

Telephone: (309) 833-1797

/s/ John H. Bisbee
JOHN H. BISBEE

DATED: March 24, 1992

VERIFICATION

JOHN H. BISBEE, after being first duly sworn, deposes and states that he is the attorney for the Defendant-Appellant in the above captioned matter; that he has read the foregoing MOTION TO REMAND TO CIRCUIT FOR FILING OF AND PROCEEDINGS ON A SECOND AMENDED POST TRIAL MOTION and that the statements set forth therein are true and he could and would competently so testify if called upon to do so.

/s/ John H. Bisbee
JOHN H. BISBEE

Dated: March 24, 1992

STATE OF ILLINOIS)
) SS
COUNTY OF McDONOUGH)

Subscribed and sworn to before me this 24th day of March, 1992.

/s/ Peggy Geisler
NOTARY PUBLIC

"Official Seal"
Peggy Geisler
Notary Public, State of Illinois
My Commission Expires 12/4/93

CERTIFICATE OF MAILING

I hereby certify that I have this 24th day of March, 1992, deposited a true and correct copy foregoing MOTION TO REMAND TO CIRCUIT COURT FOR FILING OF AND PROCEEDINGS ON A SECOND AMENDED POST TRIAL MOTION in the United States mails, postage prepaid to Mr. Alan D. Tucker, State's Attorney, Mason County Courthouse, P.O. Box 446, Havana, IL 62644 and Mr. Robert J. Binderman, Deputy Director, State's Attorneys Appellate Prosecutor, Fourth District Office, 151 Bruns Lane, Suite 103, Springfield, IL 62706.

/s/ John H. Bisbee

APPENDIX E

(Seal)

State of Illinois
Appellate Court
Fourth District
Supreme Court Building
Springfield 62701-1792

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

DATE: March 31, 1992

RE: People v. Jacobson
General No. 4-91-0921

TO COUNSEL:

Appellant's motion to remand to circuit court for filing of and proceedings on a second amended post trial motion DENIED.

Appellant's motion for an extension to file brief ALLOWED, to and including April 23, 1992.

Docket order amended.

DARRYL PRATSCHER, Clerk
Appellate Court
Fourth District

DP:py

TO:

John H. Bisbee
Law Offices of John H. Bisbee
437 North Lafayette Street
Macomb, IL 61455

Alan D. Tucker, State's Attorney, Mason County
Robert J. Biderman, S.A.A.P.
Elliott Turpin, Staff Attorney

APPENDIX F

[p. 1] STATE OF ILLINOIS
EIGHTH JUDICIAL CIRCUIT
MASON COUNTY

IN THE MATTER OF:

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
-versus-	)	CASE NO. 90-CF-71
MICHAEL JACOBSON, Defendant.	)	

EXCERPT OF PROCEEDINGS held in the above entitled cause on the eighteenth day of September, A. D., 1991, before the HONORABLE FRED W. REITHER, presiding judge, and a jury, in Courtroom #1 of the Mason County Courthouse, Havana, Illinois.

APPEARANCES:

MR. ALAN D. TUCKER,
State's Attorney,
Mason County, Illinois,
Appeared On Behalf of the People;

MR. DEAN A. STONE,
Attorney at Law,
Macomb, Illinois,
Appeared On Behalf of the Defendant;

MR. MICHAEL JACOBSON,
Defendant,
Appeared In His Own Proper
Person and With His Attorney.

[p. 2] (The voir dire examination was conducted and the jurors sworn to try the issues and opening statements were made by counsel)

THE COURT: State may call its first witness.

MR. TUCKER: Thank you Your Honor.

TIMOTHY L. HOCKETT,

a witness called on behalf of the People, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Tucker:

Q Please state your name.

A Timothy Lawrence Hockett.

Q And what is your address Tim?

A It is – I am with the carnival. I get my mail at Middletown.

Q Middletown, Illinois?

A Yes.

Q Who is your employer now?

A Big M Amusement.

Q And what capacity do you work for Big M at this time?

A I am like a foreman.

Q How old are you?

A Eighteen.

Q Were you employed by Big M Amusements in September of 1990?

[p. 3] A Yes sir.

Q And were you employed by that company when the carnival visited Havana in September of 1990?

A Yes sir.

Q And generally speaking where does the carnival set up when it comes to Oktoberfest?

A Out in the street in front of the courthouse.

Q Is that the one that has the boulevards in the middle?

A Yeah.

Q At that time were you assigned to a particular ride or were you a foreman?

A I was assigned to run the Octopus.

Where was it located?

A On this corner over here.

Q You don't know the name of the streets?

A I don't know the streets at all.

Q In relationship to the Mason County Sheriff's Department, where was it located?

A Right in the middle of that intersection on the corner.

Q Be just east of the Sheriff's Department.

A If that is east.

Q Just south.

A Yeah.

[p. 4] Q On what day did the carnival arrive in Havana, do you recall?

A I think it was Wednesday.

Q And do you recall what day it left?

A Sunday.

Q Had you been in Havana with the carnival prior to September of 1990?

A No sir.

Q Did you return this year when the carnival came?

A Yes sir.

Q Now then I want to direct your attention to approximately eleven thirty that evening, where were you at that time – let me rephrase, the evening, Friday evening, September 7, where were you at?

A Was sitting on the roll plane platform.

Q So your ride was closed for the evening?

A Yes sir.

Q And where was that located?

A The roll plane platform, at the stop sign right here on the corner, straight across the street from the Sheriff's Office.

Q Was anyone with you?

A Yes sir.

Q And do you recall the individual's name?

[p. 5] A Lorenzo.

Q Do you know his last name?

A I think it is Washington, but I am not positive.

Q Is he black?

A Yes sir.

Q Where were you and Lorenzo doing at that time?

A Sitting there talking.

Q Is there a street light there at that intersection?

A I am not sure. I don't think so.

Q What, if anything, did you notice at that time?

A A couple walking down the street arguing.

Q How come that seemed unusual to you?

A We had not seen it any other time.

Q Where were they located?

A They were walking down the street in front of the Sheriff's Office.

Q So kind of across the street from where you were?

A Yes.

Q North side of Market Street.

A That is north, yes.

Q What happened next?

A They proceeded to cross the street going that way and they kept arguing toward each other back and forth. Then the lady got upset with the man, started yelling louder toward [p. 6] him, so he hit her. She hit the ground and then she got up and yelled even louder toward him. They were just, you know exchanging words as you could put it and then she hit him a few times in the gut and he just stood there like nothing happened and then he went and grabbed her and slapped her. She hit the ground.

Q Where did that occur at from your location at the roll low plane platform.

A Right there when they crossed the street, it is the first tree right in that area.

Q Did you know these people?

A No sir.

Q After you had seen this, what did you do?

A I went across the street to the Sheriff's Office, told the police officer.

Q Approximately how far away from you was the couple when you saw the altercation and the fighting?

A I think it is like twenty yards, something like that.

Q You had a clear view of this?

A Yes.

Q So you reported this then to the Sheriff's Office?

A Yep.

Q What did you do after you made your report?

A Me and Lorenzo proceeds back up the door and went and [p. 7] sat back down.

Q Did you see the couple again?

A Yeah.

Q Where did you see them next?

A It was on the same side of the street. He was trying to get her up and then either he got her up or picked her up, but his feet were walking down the sidewalk, her's weren't moving, like he was carrying her and they went across the street to the corner and that is when the police officer showed up and the squad car.

Q So then they were on the other side of the tree, is that correct?

A They were on this side of the tree on the sidewalk. They were walking up the street, and then they cross the street like at an angle and was headed for the corner.

Q Did they go to the sidewalk on the other side of the street.

A No, they made it to the stop sign and she sat down next to the stop sign.

Q What did you see next then?

A The police officer raced up the street and stopped at the corner and then he proceeded around the corner

and went and made a right up at the top of the hill and then another cop car stopped up at the hill.

[p. 8] Q Did they stop near this couple, did the police car stop near the couple?

A Yes, right there.

Q Did you see any conversation between them?

A No.

Q Was that the last time you saw the man and the woman?

A Yes.

Q Could you describe what the man looked like?

A Was about six foot, maybe a little taller, dark hair, sort of slim and the woman, she was about anywhere five five to five eight and shoulder length hair, dirty blonde.

Q Have you ever seen these people since that time?

A No.

Q The people you saw struggling near the tree, was that the same couple the police car stopped by?

A Yes.

Q No further questions Your Honor.

THE COURT: Cross?

MR. STONE: Thank you Your Honor.

Cross Examination by Mr. Stone:

Q Mr. Hockett how old are you please?

A Eighteen.

Q Did you finish high school sir?

A No.

[p. 9] Q You got your GED yet?

A No.

Q Now do you remember a previous statement where you said that the events you just testified to occurred between twelve thirty and one o'clock in the morning.

A What is that?

Q I am sorry, Mr. Hockett do you remember where you made a previous statement that which you just testified to occurred between twelve thirty and one o'clock on Saturday morning hours, do you remember that?

A I remember giving a statement, yes.

Q And you remember giving that timeframe at that time?

A I am not positive. I might have.

Q Do you remember giving a deposition in regard to this case?

A Yes.

Q Do you remember if you were asked the question at about what time was that and your answer was probably twelve thirty, maybe one o'clock, is that correct?

A Probably. I am not sure.

Q I am sorry.

A Probably, I am not sure.

Q And you stated that this couple that was walking in front of the Sheriff's Office was arguing loudly, is that correct?

[p. 10] A Yes.

Q I think you previously stated at another time, they were so loud that people could hear it a block away.

A Yeah.

Q And going back to the timeframe here while between twelve thirty and one o'clock, didn't get out of your trailer twelve twenty-seven, twelve thirty. Do you remember looking at your clock in the trailer?

A No.

Q Do you remember that you got done after twelve o'clock and then some point in time changed your clothes and then getting out of your trailer about twelve thirty or thereabouts?

A It is possible.

Q Didn't you previously say that in a deposition?

A I am not sure if I did or not.

Q Do you remember the question how long were you in the trailer. Answer, probably about ten or fifteen minutes. Question, so you didn't get out of your trailer until right around twelve thirty, twelve twenty-seven. Answer, something like that. Is that correct. Mr. Hockett, do you remember giving that sworn deposition?

A Yeah.

Q And is that correct in as far as the timeframe?

[p. 11] A Yes.

Q Do you remember in your deposition also stating the couple you are taking about had cups of beers in their hands?

A Yes sir.

Q Do you remember what size cups they were at this point?

A I don't. Something like twice as large as the foam, like that.

Q Like that?

A Yes.

Q Do you remember full or half full or half empty?

A Couldn't see it.

Q You remember stating that for this couple that was up there that there were a lot of people that came up there do you remember saying that?

A After the police cars, yes.

Q There were three police cars?

A No, two.

Q And as far as the number of people you remember saying in your deposition that there were probably about fifty or so that came up?

A Yes.

Q So a whole lunch [sic] of people there?

A Oh yes.

Q Remember in your previous deposition that you describe [p. 12] the woman as a possible brunette rather than a dirty blond?

A I don't know what a brunette is.

Q Brown.

A About the same as dirty blonde, that is about the same, that is what I characterize as the same type of hair.

Q Okay. I don't have any other questions.

THE COURT: Redirect?

MR. TUCKER: Yes, Your Honor.

Redirect Examination by Mr. Tucker:

Q Mr. Hockett in your first visit in September of 1990 to Havana with Big M. Amusements, at any other time other than the time you testified to, did you see any other man and woman hitting each other?

A No.

Q And this was right at the tree over at Market Street, is that correct?

A Yes.

Q That is the only time you saw any man or woman hitting each other?

A Yes.

Q That is all I have.

Recross Examination by Mr. Stone:

A [sic] Mr. Hockett you never saw this man or woman again, have you?

[p. 13] A No.

Q Thank you, no further questions Your Honor.

THE COURT: You may step down.

A Thank you.

(Witness excused.)

APPENDIX G

[p. 1] STATE OF ILLINOIS

EIGHTH JUDICIAL CIRCUIT

MASON COUNTY

IN THE MATTER OF:

THE PEOPLE OF THE
STATE OF ILLINOIS,

Plaintiff,

-versus-

MICHAEL JACOBSON,

Defendant.

CASE NO. 90-CF-71

PRELIMINARY HEARING

REPORT OF PROCEEDINGS held in the above entitled cause on the twentieth day of September, A. D. 1990, before the HONORABLE THOMAS L. BROWNFIELD, presiding judge, in a courtroom located in the Mason County Courthouse, Havana, Illinois.

APPEARANCES:

MR. ALAN D. TUCKER,
State's attorney,
Mason County, Illinois,
Appeared On Behalf of the
People;

MR. WILLIAM H. KNUPPEL,
Attorney at Law,
Havana, Illinois,
Appeared On Behalf of the
Defendant;

MR. MICHAEL JACOBSON,
Defendant,
Appeared In His Own Proper
Person and With His Counsel.

[p. 2] THE COURT: Be the matter of People of the State of Illinois versus Michael Jacobson, 90-CF-71. The Defendant appears in person and with counsel, William H. Knuppel. This cause comes forth for preliminary hearing. Gentlemen are you ready to proceed.

MR. TUCKER: State is ready.

MR. KNUPPEL: Ready Your Honor.

THE COURT: Alright, Mr. Tucker you may call your witness.

MR. TUCKER: Call Gregory Cox to the stand.

GREGORY COX,

a witness called on behalf of the People, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Tucker:

Q. State your name please.

A. Gregory J. Cox.

Q. Where are you employed Mr. Cox?

A. Mason County Sheriff's Department.

Q. How long have you been so employed?

A. Since May of 1990.

Q. Are you employed there on a full time basis?

A. No sir.

Q. What exactly is the nature of your employment with the sheriff's department?

A. I am appointed as a part time deputy sheriff under [p. 3] Sheriff Richard Walker to provide patrol on any case that is needed, any instance needed.

Q. In case someone is on vacation or things like that?

A. Correct.

Q. What is your full time employment?

A. Full time is with Mason District Hospital as an emergency medical technician.

Q. I want to direct your attention to September 9, of 1990, were you employed part time basis with the sheriff's department on that date?

A. Yes sir.

Q. And what were your duties on that particular date?

A. I was asked to act as a deputy sheriff for the festivities of Ocktoberfest [sic] and the surrounding area.

Q. Basically crowd control?

A. Correct.

Q. Were you in uniform on that particular date?

A. No sir.

Q. Could you describe to the Court how you were dressed that particular date?

A. I was wearing a plaid shirt that was green, pink and white, a pair of stonewashed jeans, white socks and white tennis shoes. I was wearing a badge on my belt, right front side; a gun on my right hip, a pair of handcuffs on the [p. 4] left front side, radio on my left back side.

Q. Did you have any kind of headwear?

A. No sir.

Q. Okay. Now then on that date did you have an occasion to respond to a call of dispatch from Mason County Sheriff's Office?

A. We responded to a call for the activities of the Ocktoberfest [sic]. All issued city portables since in the city. We received a call approximately, it was actually the seventh at eleven fifty-one p.m. too, we received a call of report of a male subject beating on a female subject in the area of the one hundred block of East Market Street, which was at the edge of the festivities.

Q. Who dispatched that call?

A. The sheriff's office received the initial report, which in turn called the city police department and they notified us.

Q. And was there a log made of that dispatch to your knowledge?

A. Yes sir.

Q. And have you had occasion to review that log?

A. Yes sir.

Q. Okay, and that is how you got this specific time, is that correct?

[p. 5] A. That is correct.

Q. Now then you have testified that we were dispatched, could you tell us who else you mean by that?

A. Officer Larry Seward of the Havana Police Department.

Q. And what did you and Mr. Seward do at that time?

A. We proceeded to that area in a marked city police car.

Q. This would be the area of the one hundred block of East Market, is that correct?

A. That is correct.

Q. Is that in the City of Havana?

A. Yes.

Q. And Mason County?

A. Yes sir.

Q. And State of Illinois?

A. Yes sir.

Q. Approximately what time was it when you arrived in that area?

A. I believe it was approximately eleven fifty-four p.m.

Q. And how was Mr. Seward dressed if you recall?

A. Officer Seward was dressed in a regular city police issued uniform.

Q. And who was driving the motor vehicle?

A. Officer Seward.

[p. 6] Q. Where were you in the car?

A. I was located in the front passenger side of the vehicle.

Q. In response to the dispatch had you or Mr. Seward activated you emergency lights on the car?

A. Yes sir.

Q. Okay, and what happened then when you arrived in that area?

A. When we arrived in the area, which we started Broadway and Market, which would be the beginning of the one hundred block of East Market. We first noticed a group of five or six people walking east. It had a male and female in it, also some children. We slowed down, had the windows rolled down on the squad car. We further proceeded east on Market Street. Where we noticed two other subjects walking east on Market Street in front of what is known as Eaton's Apartments. When we drove by, they were on my side of the car.

Q. Which direction would that be?

A. We were driving east.

Q. So the south side of the road?

A. Correct, they were on the south side of the road. When we drove by I heard what appeared to me to be a female subject, not really crying out loud, but what I would call whimpering or trying to hold back a cry. We proceeded on [p. 7] past the two subjects, turned around so we were heading west on Market Street. Again passed the two subjects. Officer Seward at that time stated that he could hear the same as what I was describing as a whimpering or crying type of sound coming from what appeared to be where the two subjects were. We again turned around and approached the two subjects from the back and stopped behind them in front of the Lutheran Church, the beginning of the two hundred block of East Market.

Q. At this time had you had your lights activated?

A. Yes sir.

Q. And what happened when you stopped?

A. When we stopped, Officer Seward exited the driver's side of the squad car. I exited the passenger side of the squad car. We identified ourselves as police officers and asked if there was a problem.

Q. How did you identify yourselves, what exactly did you say?

A. Officer Seward said – he asked them to stop because they kept walking. We asked them to stop. He said hold it a minute. I would like to talk to you. We are with the police department. Mr. Jacobson, who at that time I didn't realize who it was, stopped. Female subject also stopped. We walked up to them. Mr. Jacobson

became kind of verbally abusive in yelling what do you want, what is going on.

[p. 8] Q. Did he curse at you at that time?

A. Yes sir.

Q. Okay.

A. Officer Seward asked if there was a problem. Mr. Jacobson then stated, quoting, "no, there is no fucking problem." At that time I noticed that the female subject, Mrs. Jacobson, that was with Mr. Jacobson, was bleeding from what appeared to be around the chin and mouth area. I stated that Mrs. Jacobson was bleeding. At which time I asked what had happened. Why was she bleeding. Mr. Jacobson answered for her, saying she had just fallen on the sidewalk. At the time Officer Seward asked Mrs. Jacobson if she would like an ambulance. Mr. Jacobson stated and I quote, "We don't need any fucking ambulance. Just take us home and I will take her to the hospital myself." At that time we agreed to take Mr. and Mrs. Jacobson to their residence to allow him to take her to the hospital for medical attention. I asked Mr. Jacobson if he would like us for a quicker treatment to take her to the hospital and drop her off and then we would take him to get his vehicle so he could meet her. He stated that he did not want that done and that we were just trying to prove that he had hit her.

Q. Was this the end of the conversation outside of the vehicle?

[p. 9] A. That is correct.

Q. Then what happened?

A. Mr. and Mrs. Jacobson got into the squad car. Mrs. Jacobson first, Mr. Jacobson second. They positioned themselves, Mrs. Jacobson in the rear middle of the back. Mr. Jacobson on the right side of the rear back seat. Shut the door. Officer Seward got in on the driver's side of the squad car on the front seat. I got in the passenger side front seat of the squad car. We proceeded east on Market. Mr. Jacobson stated that their address was on East Main Street. We were proceeding down East Market. Officer Seward asked me if I would obtain the names of the two subjects for a report purpose. I asked what Mr. Jacobson's full name was. He at that time again asked who I was and I told him that I was a deputy sheriff from Mason County and that I need his full name and correct spelling for a report. He at that time gave me his name and spelled it. I asked the female subject for her name. He answered for her also. Giving me her name and spelling it. We proceeded to Promenade Street where we turned south on Promenade, traveled to Main, turned east on Main and stopped in front of the residence at 415 East Main Street, Havana.

Q. Which side of the road?

A. Located on the south side of the road.

[p. 10] Q. Did you pull into the driveway or just pull in front?

A. We pulled in front of the residence, stopped at the end of the driveway.

Q. Did you have your emergency lights activated?

A. Not at that time.

Q. What happened when you pulled in front of the residence then?

A. When we pulled in front of the residence, I exited the vehicle leaving the front passenger door open. I leaned back to open the back door on the city police cars the back doors cannot be opened from the inside. So I leaned back to open the back door from the outside to let Mr. and Mrs. Jacobson out. Mr. Jacobson as he was getting out of the car, Officer Seward stated if you need anything tonight, give us a call. Mr. Jacobson at that time became upset, stated, quote, "You don't know who I am. Get the fuck out of my way." At which time he struck me with both open hands in the upper chest area, pushing me backwards into the inside of the front door, which was standing open. I bounced off of the door. He hit me again in the chest in the same manner. I bounced off the door again. When I knew he was going to hit me again, I started to turn away. He hit me in the left shoulder and left upper back area at which time I struck what I would call the gutter around the door of the squad car [p. 11] with my nose. As I turned around, pulling myself away from the car, Officer Seward had Mr. Jacobson on the ground.

Q. How did Mr. Jacobson react to the actions of Mr. Seward?

A. He was yelling, screaming, cussing at us. I recall at one time he asked Mrs. Jacobson if he could fight us. He, as soon as I turned around, away from the squad car to where I could see what was going on, I assisted Officer Seward in cuffing Mr. Jacobson. I grabbed his right arm and put a handcuff on the right wrist. Mr. Jacobson was

jerking his left arm away from us and thrashing his feet. We couldn't get his left arm under control. At which time I called for assistance, which we did receive. Officer Fred Ray of the Havana Police Department arrived. Deputy Bill Barnes from Mason County Sheriff's Office and Deputy Troy Bonnett from the Mason County Sheriff's Office.

Q. Was Mr. Jacobson under your control at the time these officers arrived?

A. No sir.

Q. Now then you indicated that your nose struck the railing or as you called it the guttering above the door, is that correct?

A. That is correct.

Q. Did this cause any bleeding?

[p. 12] A. No sir.

Q. Did you seek medical treatment for this?

A. Yes sir.

Q. Could you state to the Court what the nature of your medical treatment was?

A. I went to Mason District hospital emergency room and I started having a little bit of pain in my chest and my nose started turning red and swelling a little bit. I went through the emergency room. They took x-rays of my chest and my nose. The emergency report reflected that I had redness and bruising to the chest, redness and swelling to the nose and a chip fracture to the nose.

Q. Is the individual who you have identified as Mr. Jacobson, who pushed you in the chest, is he present in court today?

A. Yes sir.

Q. And could you identify him please?

A. He is sitting next to Attorney Knuppel wearing a gray pinstripe suit, pink tie, white shirt.

Q. Might the record reflect the witness has identified the Defendant, Michael Jacobson?

THE COURT: The record will so reflect.

Q. Now in the course of the arrest of Mr. Jacobson, he also suffered injury, did he not?

[p. 13] A. That is correct.

Q. To your knowledge do you know how that injury occurred to him?

A. No sir.

Q. Did you cause that injury?

A. Not to my knowledge sir.

Q. And to your knowledge was – did he have any injury prior to the moment that he struck you?

A. Not to my knowledge.

Q. You indicate in you report you believed that you detected an odor of alcohol about Mr. Jacobson and Mrs. Jacobson, is that correct?

A. That is correct.

Q. And how did you describe that in the report or how would you describe that?

A. I described that as I detected that in initial contact at the Lutheran Church, two hundred block of East Market. I detected an odor of alcohol on Mr. and Mrs. Jacobson both and when Mr. Jacobson yelled or spoke to us, you could detect a definite odor of alcohol on his breath.

Q. At any point in time did you cause or provoke Mr. Jacobson into striking you?

A. No sir.

Q. At any point in time was Mr. Jacobson or Mrs. Jacobson [p. 14] placed under arrest prior to when he was on the ground after striking you?

A No sir.

Q At any point in time was Mr. or Mrs. Jacobson forced or ordered to enter into the police squad car?

A No sir.

Q No further questions Your Honor.

THE COURT: You may cross examine.

Cross Examination by Mr. Knuppel:

Q Mr. Cox would you tell us about your police training please?

A My initial police training started when I was in high school. Member of the Police Explorers Program in Manito, which I was an active member of three years, which was basically a group through the Manito Police

Department in which I attended training classes regularly on different subjects and provided security for basketball games, special event type of things. I was appointed a police offer for the Village of Bath April 9 of this year and in May I was appointed a deputy sheriff for Mason County under Richard Walker.

Q And have you had any formal police training through PTI.

A I have not. I was required to attend forty hour [p. 15] mandatory which is state requirement to carry a side arm.

Q When did you attend that?

A I attended that at the end of April this year.

Q And how old are you?

A Twenty-two.

Q Now on the date that this happened you were being paid by the county, is that correct?

A No sir, as it was an agreement between the county and the chamber of commerce.

Q So actually did you receive payment from –

A I received payment from the county, but I am not exactly sure, but I believe the chamber of commerce actually paid the county.

Q So you weren't working for the city?

A No sir.

Q And you didn't have a uniform on?

A No sir.

Q A hat of any kind?

A No sir.

Q Now would you tell us about your past medical problems that you have had with your nose please?

A Yes, I had my nose fractured when I was smaller. I don't exactly remember how old I was. It was again fractured I believe six months after that, or something like that. I [p. 16] had it operated on two years after the initial breaking of my nose to straighten it out and rebuilt it. In February of this year I received surgery again to repair all of the cartilage which had busted loose.

Q And after February of this year, and x-rays taken of your nose?

A There was x-rays when I had surgery in February.

Q Since that time any x-rays before the time of this, between February and September 8?

A Not that I know of. The nose specialist took x-rays in surgery after he was done.

Q The chip that you have described, do you know whether or not that chip existed since February?

A It did not show in February when he took the x-rays [sic] were taken prior to surgery.

Q When you went to the emergency room, do you recall what you reported had happened to you on the night of this occurrence?

A I recall that I had been struck.

Q And is that what you told them you had been struck by someone in the nose?

A I told them I was struck in the chest twice and that I was struck in the left shoulder and left upper back and hit my face on the roof of the police car.

[p. 17] Q But on September tenth you did sign a criminal information saying that without legal justification that Mr. Jacobsen struck you in the face with his fist, didn't you?

A Yes.

Q Was that not accurate?

A That was not accurate. It was amended.

Q Why did you sign it if it wasn't accurate?

A I misread it and had not described to Assistant State's Attorney Judith Lozier exactly what had occurred.

Q Do you know who the person was who contacted the sheriff's office about Mr. Jacobson and his wife?

A No sir, I don't.

Q Do you know you got a call from the city who got a call from the county, but you don't know who complained to the county?

A No.

Q Have you made any effort to find out.

Q I asked if they knew and they said someone who had walked in, two people had walked in and reported.

Q So you don't know who those two people are as you sit there today?

A No sir.

Q And you say Mr. and Mrs. Jacobson were walking on the south side of the street when you first saw them that evening?

[p. 18] A That is correct.

Q And did Mr. Jacobson or his wife ever tell you that actually his wife had fallen on the north side of the street?

A No sir.

Q Now did you believe Mr. Jacobson to be intoxicated that evening?

A I believed him to be drinking. I don't really say that I would believe him intoxicated. I didn't do a field sobriety. There was no need. He was not operating a motor vehicle.

Q You took him home knowing he was going to get into an automobile to take his wife to an emergency room.

A That is correct.

Q And you had no problem with that?

A I didn't feel Mr. Jacobson wasn't acting as if he was drunk or intoxicated. I knew he had been drinking, but I didn't feel that he would – I mean he wasn't swaying or staggering when we approached them.

Q You would have no problem with him operating a motor vehicle in the condition he was in.

A I don't believe so at that time.

Q Now do you know whether or not Mr. Jacobson was struck in the face by a billy club that evening or zap?

A No sir.

[p. 19] Q Was he bleeding when you say him trying to handcuff him?

A I first noticed he was bleeding when I turned around from the police car. He was face down, he was on his stomach and I first realized that he was bleeding when he said that he was bleeding. He said he was bleeding.

Q He had considerable blood on him by the time he got to the hospital, didn't he?

A That is correct.

Q Where was that blood coming from?

A That blood was coming from Mr. Jacobson's nose.

Q Do you know how that happened?

A No sir.

Q You weren't looking when whatever happened happened?

A I don't understand the question.

Q You didn't see what happened?

A Whatever caused him to bleed, no sir.

Q Did anyone tell you what happened.

A Well Officer Seward stated that he had hit Mr. Jacobson.

Q With what?

A With his fist.

Q With his fist?

A I believe so.

[p. 20] Q And you know the reason for that?

A Because Mr. Jacobson was assaulting me.

Q When he pushed you in the chest?

A That is correct, and pushed me into the car.

Q And it is your sworn testimony here today that the pushing of you in the chest took place before Mr. Jacobson was struck by Officer Seward?

A That is correct.

Q Now you had written a traffic citation to Mr. Jacobson on the evening this took place and charged him with resisting arrest, for what was he being arrested?

A I didn't issue Mr. Jacobson a traffic citation.

Q One issued by someone. I can't read it. Mr. Seward. Did you know why he would have been given a ticket for resisting arrest?

A In the event we tried to place him under arrest; he resisted.

Q That was for doing what?

A That is when he struck me or pushed me in the chest and he was wrestled to the ground by Officer Seward, however they got to the ground.

Q You were trying to make the arrest then?

A Yes.

Q For what offense?

[p. 21] A Aggravated battery of a police officer.

Q I must be confused. I thought the striking of you took place after this wrestling arrest.

A No sir. I don't understand where you got that, no sir.

Q So you are saying the resisting arrest was from the offense of aggravated battery?

A That is correct.

Q There was no attempt to arrest Mr. Jacobson for any offense prior to the time he struck you?

A No sir.

Q No reason to believe he committed any offense. You did not try to arrest him, is that correct?

A No sir, that is correct.

Q And the only reason Mr. Jacobson struck you was because of what, what do you think the reason he struck you was?

A He became irritated directly after Officer Seward said if you need anything else, give us a call tonight. I would assume that somehow upset Mr. Jacobson.

Q And you were out of the car at that point?

A That is correct.

Q Any why were you out of the car?

A Opening the rear door of the car. I had the rear door of the car open.

[p. 22] Q That was the side Mr. Jacobson was on?

A That is correct.

Q And his wife was in the middle?

A That is correct.

Q And he just for no reason, just started hitting you?

A That is correct.

Q Excuse me a minute. Want you to search your memory a moment Mr. Cox and as you review, who was sitting where as you opened the rear door, who got out first?

A I believe Mr. Jacobson got out first.

Q Is it possible his wife got out first?

A I don't believe so. I believe he got out first. That is at the point where Officer Seward turned and stated to Mrs. Jacobson if you need anything else, give us a call tonight.

Q Where was Mrs. Jacobson at that time.

A She was still in the back seat of the car.

Q You are sure she didn't get out first?

A I believe Mr. Jacobson stepped out first.

Q Did you try to assist her to the house?

A No sir.

Q Did anyone try to assist her?

A At what point?

Q After she exited from the vehicle.

[p. 23] A Mrs. Jacobson didn't go to the house.

Q Where did she go.

A Mrs. Jacobson when she got out of the vehicle, at which time she got out of the vehicle, was the first I noticed her out was when Mr. Jacobson and Officer Seward were all three on the ground. I was attempting to put the handcuffs on Mr. Jacobson.

Q Did you see to it Mrs. Jacobson got medical attention to her chin?

A I asked her again after Mr. Jacobson was in custody if she would like an ambulance and she again refused.

Q You just left her at home?

A That is what she stated she wanted to do.

Q I have no further questions Your Honor.

THE COURT: Any redirect?

MR. TUCKER: No Your Honor.

THE COURT: You may step down.

(Witness excused.)

MR. TUCKER: That is all of the evidence on behalf of the People.

THE COURT: Defendant wish to be heard on anything?

MR. KNUPPEL: No, Your Honor.

THE COURT: Based upon the evidence, the Court would find probable cause to hold the Defendant to answer to the charges [p. 24] herein. Do you wish to proceed to arraignment?

MR. KNUPPEL: Yes, we do.

THE COURT: And to the charge of aggravated battery, how does your client plead?

MR. KNUPPEL: Pleads not guilty.

THE COURT: Wish trial by jury?

MR. KNUPPEL: Yes, and we would like the October calendar if the State would be prepared.

THE COURT: Any problem with that Mr. Tucker?

MR. TUCKER: I don't think so.

THE COURT: Seems to me this case is not that complicated. We ought to be able to try it in October. Cause set for the October jury calendar commencing the ninth of October or as soon thereafter as it may be heard. Pre-trial hearing gentlemen will be the afternoon of the twenty-seventh of September. Mr. Knuppel I think you have several other cases set at that time.

MR. KNUPPEL: I will make it the same time, one fifteen or one twenty.

THE COURT: I am not certain. Early afternoon. You must return to Court at that time Mr. Jacobson. If you

fail to appear your bond could be forfeited and a new warrant for your arrest and the State could proceed to trial in your absence. Anything further. Thank you.

(Whereupon proceedings in the above entitled cause ended.)

[p. 25] STATE OF ILLINOIS)
) ss.
COUNTY OF MASON)

I, LINDA D. BLESSMAN, an Official Court Reporter of the Eighth Judicial Circuit, do hereby certify that I reported in shorthand the proceedings held in the above entitled cause; that I thereafter transcribed into typewriting the above REPORT OF PROCEEDINGS, consisting of Twenty-four (24) Pages, which I hereby certify is a true and correct transcript of my shorthand notes in this cause.

/s/ Linda D. Blessman
LINDA D. BLESSMAN
Officer Court Reporter

Dated this nineteenth
day of October, 1990.

APPENDIX H

No. 4-91-0921

IN THE APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -v- MICHAEL JACOBSON, Defendant-Appellant.	)))))))	Appeal from the Circuit Court of the Eighth Judicial Circuit Mason County Case No. 90-CF-71 Honorable Fred Reither Judge Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

I. POINTS AND AUTHORITIES

A. INTRODUCTION..... 11

U.S. v. Cronic, 466 U.S. 648 (1984).....12, 13

People v. Hattery, 109 Ill.2d 449 (1986)..... 12

Murray v. Carrier, 477 U.S. 478 (1986)..... 12

Smith v. Murray, 477 U.S. 527 (1986) 12

Jackson v. Virginia, 443 U.S. 307 (1979) 12

People v. Linscott, 142 Ill.2d 22 (1991) 13

People v. Lawler, 142 Ill.2d 548 (1991) 13

People v. Smith, 141 Ill.2d 40 (1990) 13

People v. Mullen, 141 Ill.2d 394 (1990) 13

Supreme Court Rule 615(a) 13

People v. Shields, 143 Ill.2d 435 (1991) 13

Strickland v. Washington, 466 U.S. 668 (1984) 13

B. IT WAS PLAIN ERROR AND A BREAKDOWN OF THE ADVERSARY PROCESS RESULTING IN A MISCARRIAGE OF JUSTICE AND DENIAL OF DUE PROCESS WHERE THE PROSECUTION CAUSED AND THE COURT AND DEFENDANTS COUNSEL PERMITTED DEFENDANT TO BE TRIED ON THE FALSE FACTUAL PREDICATE THAT DEFENDANT HAD BEATEN HIS WIFE DRAWING POLICE ATTENTION TO HIM RESULTING IN THE CHAIN OF EVENTS LEADING TO DEFENDANT'S CHARGE AND CONVICTION FOR AGGRAVATED BATTERY 14

1. Breakdown of Adversary Process and Plain Error Where Counsel Permitted Defendant to be Tried on Theory That He Had Beaten His Wife Which Was Not Established and for Which Defendant Had No Criminal Exposure 14

U.S. v. Cronic, 466 U.S. 648 (1984) 14-16

Schaefer, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1 (1956) 15

McMann v. Richardson, 397 U.S. 759 (1970) 15

Herring v. New York, 422 U.S. 853 (1975) 15

United States Constitution, Sixth Amendment 15

Ex rel Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975) 16

People v. Hattery, 109 Ill.2d 449 (1986) 16

People v. Redmond, 50 Ill.2d 313 (1972) 16

People v. DeSimone, 9 Ill.2d 522 (1956) 16

People v. Caballero, 126 Ill.2d 248 (1989) 16

Strickland v. Washington, 466 U.S. 668 (1984) 16

People v. Torres, 209 Ill.App.3d 314 (1st Dist. 1991) 16

People v. Chandler, 129 Ill.2d 233 (1989) 16, 17

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990) 17

People v. Hendricks, 137 Ill.2d 31 (1990) 17

People v. Smith, 141 Ill.2d 40 (1990) 17

2. Trial on False Factual Predicate in State's Case in Chief and in State's Cross Examination of Defense Witnesses 17

Smith v. O'Grady, 312 U.S. 329 (1941) 18

Henderson v. Morgan, 426 U.S. 637 (1976) 18

Jackson v. Virginia, 443 U.S. 307 (1979) 18

Cole v. Arkansas, 333 U.S. 196 (1948) 18

Presnell v. Georgia, 439 U.S. 14 (1978) 18

In re Oliver, 333 U.S. 257 (1948) 18

People v. Hendricks, 137 Ill.2d 31 (1990).....18, 19

People v. Lindgren, 79 Ill.2d 129 (1980).....18, 20

People v. Richardson, 123 Ill.2d 322 (1988).....18

People v. McCarthy, 132 Ill.2d 331 (1989).....18

People v. Romero, 66 Ill.2d 325 (1977).....18

Graham, Handbook of Illinois Evidence, §404.5 (5th Ed. 1990).....18

Michelson v. U.S., 335 U.S. 469 (1948).....19

McCormick on Evidence, §190 (E. Cleary, 3d Ed. 1984).....19

Wigmore, Evidence in Trials at Common Law §58.2 (P. Tillers rev. ed. 1983).....19

Kalven and Zeisel, The American Jury (1966).....19

U.S. v. Myers, 550 F.2d 1036 (5th Cir. 1977).....19

U.S. v. Foskey, 636 F.2d 517 (D.C. Cir. 1980).....19

U.S. v. James, 555 F.2d 992 (D.C. Cir. 1977).....19

U.S. v. Phillips, 401 F.2d 301 (7th Cir. 1968).....19

In re Winship, 397 U.S. 358 (1970).....19

Coffin v. U.S., 156 U.S. 432 (1895).....19

Taylor v. Kentucky, 436 U.S. 478 (1978).....19

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990).....20

People v. Smith, 141 Ill.2d 40 (1990).....20

a. State's Case in Chief.....20

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990).....21

Fed.R.Evid., Rule 201(b) (2) 21

Ill.Rev.Stat. Ch. 110 §8-1002 21

May Dept. Stores v. Teamsters Union, 64 Ill.2d 153 (1976) 21

National Fire Insurance Co. v. Thompson, 281 U.S. 331 (1930) 21

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 21

U.S. v. Montemayor, 666 F.2d 235 (5th Cir. 1982) 21

People v. Hendricks, 137 Ill.2d 31 (1990) 22

Huddleston v. U.S., 485 U.S. 681 (1988) 22

Berkovich v. Hicks, 922 F.2d 1018 (2d Cir. 1991) 22

b. State's Cross Examination of Defense Witnesses 24

People v. Mullen, 141 Ill.2d 394 (1990) 25

People v. Butler, 58 Ill.2d 45 (1974) 25, 28

People v. Collins, 106 Ill.2d 237 (1985) 25, 27

People v. Conner, 176 Ill.App.3d 900 (1st Dist. 1989) 25, 28

People v. Emerson, 97 Ill.2d 487 (1983) 30, 31

People v. Hendricks, 137 Ill.2d 31 (1990) 31

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990) 31

3. The "Narrative of the Offense" Exception Does Not Apply to Permit This Case To Have Been Premised On the Wife Beating Innuendo 31

People v. Waller, 195 Ill.App.3d 376 (4th Dist. 1990) 31

People v. Lindgren, 79 Ill.2d (1980) 31, 32

People v. Armstrong, 41 Ill.2d 390 (1969) 32

Tzystuck v. CTA, 124 Ill.2d 226 (1988) 32

4. By Permitting Defendant to be Tried on False Factual Predicate Without Even a Limiting Instruction, Defendant's Counsel Enhanced Rather Than Minimized Defendant's Chances for a Conviction Amounting to Presumptive Ineffective Assistance 33

People v. Hattery, 109 Ill.2d 449 (1986) 33-35

U.S. v. Cronic, 466 U.S. 648 (1984) 33-35

United States Constitution, Sixth Amendment 33

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990) 33

People v. Washington, 210 Ill.App.3d 147 (2st Dist. 1990) 34

People v. Hendricks, 137 Ill.2d 31 (1990) 34

People v. Chandler, 129 Ill.2d 233 (1989) 34, 35

People v. Torres, 209 Ill.App.3d 314 (1st Dist. 1991) .34, 35

People v. Young, 220 Ill.App.3d 98 (2d Dist. 1991) 35

C. IT WAS PLAIN ERROR AND A DENIAL OF DUE PROCESS FOR THE COURT TO GIVE PEOPLE'S INSTRUCTION NOS. 13 AND 14 TO THE EFFECT THAT DEFENDANT HAD NO LAWFUL RIGHT TO USE FORCE TO RESIST AN ARREST AND THAT THE OFFICERS HAD A RIGHT TO USE FORCE TO EFFECT AN ARREST WHEN THE POINT AT WHICH FORCE WAS USED, DEFENDANT WAS NEITHER UNDER ARREST NOR THREAT OF ARREST, SAID INSTRUCTIONS GIVING CREDENCE TO THE FALSE FACTUAL PREDICATE THAT DEFENDANT HAD BEATEN HIS WIFE AND WAS UNDER ARREST THEREFOR 35

People v. McCauley, 2 Ill.App.3d 734 (2d Dist. 1972) 36, 38, 40

People v. Payne, 194 Ill.App.3d 238 (1st Dist. 1990) .36, 40

People v. Ogunsola, 87 Ill.2d 216 (1981) ..... .36, 39

People v. Jenkins, 69 Ill.2d 61 (1977) 36

People v. Underwood, 72 Ill.2d 124 (1978) 36

Ill.Rev.Stat. Ch. 38 §12-4 37

Ill.Rev.Stat. Ch. 38 §12-3(a) 37

People v. McBrien, 144 Ill.App.3d 489 (4th Dist. 1986) 37

People v. Emerson, 97 Ill.2d 487 (1983) 38

U.S. v. Cronic, 466 U.S. 648 (1984) ..... .38, 39

People v. Hattery, 109 Ill. 2d 449 (1986) 38

Ill.Rev.Stat. Ch. 110A §451(c), Supreme Court Rule 451(c) 39

People v. Reddick, 123 Ill.2d 184 (1988) 39

People v. Henderson, 142 Ill.2d 258 (1990) ..... .39, 40

People v. Flowers, 138 Ill.2d 218 (1990) 39

People v. Sanders, 99 Ill.2d 262 (1983) ..... .39, 40

People v. Shields, 143 Ill.2d 435 (1991) 39

People v. Stanko, 402 Ill. 558 (1949) 40

People v. Hamilton, 336 Ill. 294 (1929) 40

D. THE PROSECUTOR'S CLOSING ARGUMENT CONSTITUTED PLAIN, REVERSIBLE ERROR IN ANY ONE OR ALL OF SEVEN DIFFERENT RESPECTS DEPRIVING DEFENDANT OF THE FUNDAMENTALS OF A FAIR TRIAL AND DUE PROCESS OF LAW THEREBY WARRANTING REVERSAL 40

People v. Thompkins, 121 Ill.2d 401 (1988) 41

People v. Pittman, 93 Ill.2d 169 (1982) 41

Manninger v. Chicago Northwestern Transportation, 64 Ill.App.3d 719 (5th Dist. 1978) 41-42

Cecil v. Gibson, 37 Ill.App.3d 710 (3d Dist. 1976) 42

People v. Bean, 109 Ill.2d 80 (1985) 42, 43

People v. Emerson, 97 Ill.2d 487 (1983) 42, 43

People v. Albanese, 104 Ill.2d 504 (1984) 42

People v. Beier, 29 Ill.2d 511 (1985) 42

1. It Was Plain Error and a Denial of Due Process For the Prosecutor to Make Repeated References to His Theory That Defendant Had Beaten His Wife When There Was No Evidence to Support That Theory and That Theory Was Specifically Contradicted By the Only Two Witnesses to the Relationship Between Defendant and His Wife 42-43

People v. McCauley, 2 Ill.App.3d 734 (2d Dist. 1972) 45

U.S. v. Cronic, 466 U.S. 648 (1984) 46

People v. Hattery, 109 Ill.2d 449 (1986) 46

2. It Was Plain Error For the Prosecutor to Argue That Officer Seward Had Been "a Good Cop for Twenty Years" When There Was No Evidence to That Effect 45

Napue v. Illinois, 360 U.S. 264 (1959) 46

People v. Mullen, 141 Ill.2d 394 (1990) 47

People v. Smith, 141 Ill.2d 40 (1990) 47

Manninger v. Chicago Northwestern Transportation, 64 Ill.App.3d 719 (5th Dist. 1978) 47

3. It Was Plain Error For the Prosecutor to Argue That Defendant Had Been "Drinking All Night" When the Evidence Was That Both Police Officers Knew Defendant to Have Been Sober 47

4. It Was Plain Error For the Prosecutor to Give His Personal Opinion That the Police Officers were "Good" Police Officers and Were Telling the Truth and to Even Include in Argument an Accounting of a Supposed Personal Conversation the Prosecutor Had With One of the Police Officers Attesting to the Officer's Credibility 49

People v. Albanese, 104 Ill.2d 504 (1984) 50, 51

People v. Beier, 29 Ill.2d 511 (1985) 51

U.S. v. Cronic, 466 U.S. 648 (1984) 51

People v. Hattery, 109 Ill.2d 449 (1986) 51

People v. Owens, 102 Ill.2d 88 (1984) 51

5. It was Plain Error For the Prosecutor to Argue That Only Defendant and His Wife Had an Interest in the Outcome of the Criminal Trial When the Fact Was and the Prosecutor Knew That Both Police Officers Had an Equal Interest in the Outcome of the Criminal Trial 51

Manninger v. Chicago Northwestern Transportation, 64 Ill.App.3d 719 (5th Dist. 1978) 53

People v. Emerson, 97 Ill.2d 487 (1983) 53

U.S. v. Cronic, 466 U.S. 648 (1984) 54

People v. Hattery, 109 Ill.2d 449 (1986) 54

6. It was Plain Error For the Prosecutor to Have Attacked the Credibility of Defense Witnesses Not on the Basis of Evidence But on the Basis of What He Supposed Their Motives to Be 54

People v. Emerson, 97 Ill.2d 487 (1983) 54

People v. Wilson, 199 Ill.App.3d 792 (1st Dist. 1990) .54, 55

Napue v. Illinois, 360 U.S. 264 (1959) 55

7. It was Plain Error and a Denial of Defendant's Right to the Assistance of Counsel for the Prosecutor to Argue that Defendant, by Meeting With His Attorney, Had Rehearsed His Testimony Thereby Improperly Leaving the Implication That Defendant Had Concocted a False Story 55

People v. Emerson, 97 Ill.2d 487 (1983) 56

People v. Wilson, 199 Ill.App.3d 792 (1st Dist. 1990) 56

Geders v. U.S., 425 U.S. 80 (1976) 56

E. THE PROSECUTOR'S FIRST SECURING AN ORDER IN LIMINE PRECLUDING DEFENDANT FROM INTRODUCING EVIDENCE OF THE PRINCIPAL ARRESTING OFFICER'S EMPLOYMENT HISTORY SHOWING LOSS OF ELEVEN POLICE POSITIONS OCCASIONED BY VIOLENT AND AGGRESSIVE BEHAVIOR AND THEN TWICE COMMENTING IN ARGUMENT THAT THE OFFICER HAD BEEN A "GOOD COP FOR 20 YEARS" WHEN THE PROSECUTOR KNEW THAT WAS FALSE CONSTITUTE PLAIN REVERSIBLE ERROR AND VIOLATE DEFENDANT'S DUE PROCESS RIGHTS UNDER *NAPUE v. ILLINOIS*, 360 U.S. 264 (1959) 56

Napue v. Illinois, 360 U.S. 264 (1959).....56, 57

People v. Martin, 46 Ill.2d 565 (1970).....57, 58, 60

People v. Cornille, 95 Ill.2d 497 (1983).....57, 60

People v. Cihlar, 111 Ill.2d 212 (1986).....58, 60

Brady v. Maryland, 373 U.S. 83 (1963).....59

U.S. v. Bagley, 473 U.S. 667 (1985).....59

Bagley v. Lumkin, 798 F.2d 1297 (9th Cir. 1986).....59

Berger v. U.S., 295 U.S. 78 (1935).....60

F. IT WAS PLAIN ERROR AND A VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS UNDER *BRADY V. MARYLAND*, 373 U.S. 83 (1963), FOR THE CIRCUIT COURT TO QUASH THE SUBPOENA TO THE PROSECUTING ATTORNEY WHERE THE PROSECUTING ATTORNEY COULD HAVE CORROBORATED THAT THE DEFENDANT REPORTED THAT HE HAD BEEN ASSAULTED AND BATTERED BY THE POLICE OFFICERS AND WISHED TO PREFER CHARGES AGAINST THEM..... 60

Brady v. Maryland, 373 U.S. 83 (1963).....60-61

U.S. v. Agurs, 427 U.S. 97 (1976).....61

Giglio v. U.S., 405 U.S. 150 (1972).....61

U.S. v. Bagley, 473 U.S. 667 (1985).....61

St.Ct.Rule 415(b).....61

People v. Burns, 75 Ill.2d 282 (1979).....61

G. DEFENDANT WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT WHERE THE COMPETENT EVIDENCE, AS A MATTER OF LAW, SHOWED AS EQUALLY THAT DEFENDANT HAD BEEN ASSAULTED AND BATTERED BY THE OFFICERS BECAUSE THEY WRONGLY SUSPECTED HIM OF HAVING BEATEN HIS WIFE AS IT SHOWED DEFENDANT HAD FOR NO REASON ASSAULTED THE OFFICERS AFTER THEY HAD GIVEN HIM AND HIS WIFE A RIDE HOME AT DEFENDANT'S REQUEST WHEN THE PROSECUTION THEORY WAS, UNDER THE CIRCUMSTANCES, IMPROBABLE 62

People v. Cambell, 146 Ill.2d 363 (1992) 63

People v. Collins, 106 Ill.2d 237 (1985) 63

Jackson v. Virginia, 443 U.S. 307 (1979) 63

People v. Young, 220 Ill.App.3d 98 (2d Dist. 1991) 63

People v. Lawler, 142 Ill.2d 548 (1991) 63, 64

People v. Emerson, 97 Ill.2d 487 (1983) 63

People v. Stepteau, 142 Ill.App.3d 400 (1st Dist. 1986) 64

People v. Gordon, 204 Ill.App.3d 123 (1st Dist. 1990) 64

People v. Perroni, 14 Ill.2d 581 (1958) 64

H. IT WAS PLAIN ERROR AND A DENIAL OF DEFENDANT'S RIGHT TO THE ASSISTANCE OF COUNSEL, DUE PROCESS, AND AN INFRINGEMENT ON THE ATTORNEY-CLIENT PRIVILEGE FOR THE PROSECUTOR TO CROSS EXAMINE THE DEFENDANT AND HIS WIFE ON THEIR MEETINGS WITH DEFENDANT'S ATTORNEY PREPARATORY TO TRIAL AND TO IMPLY IN ARGUMENT THAT BY MEETING WITH COUNSEL DEFENDANT HAD CONCOCTED A FALSE STORY 66

1. Denial of Defendant's Right to Assistance of Counsel and Due Process 66

Powell v. Alabama, 287 U.S. 45 (1932) 67, 69

Argersinger v. Hamlin, 407 U.S. 25 (1972) 67

Gideon v. Wainwright, 372 U.S. 335 (1963) 67

Geders v. U.S., 425 U.S. 80 (1976) 67, 70

U.S. v. Vanuto, 182 F.2d 519 (1950) 67

People v. Noble, 42 Ill.2d 425 (1969) 67

Perry v. Leeke, 488 U.S. 272 (1989) 67, 69-70

United States Constitution, Sixth Amendment 69

U.S. v. Cronic, 466 U.S. 648 (1984) 69

People v. Hattery, 109 Ill.2d 449 (1986) 69

People v. Emerson, 97 Ill.2d 487 (1983) 70

2. Infringement on Defendant's Attorney-Client Privilege 70

People v. Adam, 51 Ill.2d 46 (1972) 71

8 Wigmore Evidence, §2292 (McNaughton, rev. ed. 1961) 71

People v. Doe, 55 Ill.App.3d 811 (1977) 71

Clackston v. Thackston, 201 Ill.App.3d 232 (1990) 71

I. IT WAS PLAIN ERROR AND A DENIAL TO DEFENDANT OF EQUAL PROTECTION OF THE LAWS UNDER THE UNITED STATES AND ILLINOIS CONSTITUTIONS WHERE THE PROSECUTOR REFUSED TO INVESTIGATE DEFENDANT'S CLAIM THAT HE HAD BEEN ASSAULTED AND BATTERED BY THE POLICE OFFICERS AND INSTEAD FALSELY PROSECUTED DEFENDANT ON THE IMPROBABLE THEORY THAT DEFENDANT HAD SPONTANEOUSLY ASSAULTED THE POLICE OFFICERS AFTER THEY HAD GIVEN HIM AND HIS WIFE A RIDE HOME, AT DEFENDANT'S REQUEST IN ORDER TO COVER THE POLICE OFFICERS' UNPROVOKED ASSAULT AGAINST DEFENDANT INSPIRED BY THEIR UNPROVABLE SUSPICION THAT DEFENDANT HAD BEATEN HIS WIFE 71

United States Constitution, Fourteenth Amendment 72

Ex parte Virginia, 100 U.S. 339 (1880) 72

Wayte v. U.S., 470 U.S. 598 (1985) 72-73, 75

Falls v. Town of Dyer, 875 F.2d 146 (7th Cir. 1989) . 72-74

U.S. v. Batchelder, 442 U.S. 114 (1979) 73

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 73, 75

Snowden v. Hughes, 321 U.S. 1 (1944) 73, 75

U.S. v. Falk, 479 U.S. 616 (7th Cir. 1973) 74

Oyler v. Boles, 368 U.S. 448 (1962) 75

APPENDIX I

No. 4-91-0921

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -v- MICHAEL JACOBSON, Defendant-Appellant.	Appeal from the Circuit Court of the Eighth Judicial Circuit Mason County Case No. 90-CF-71 Honorable Fred Reither Judge Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

LAW OFFICES OF JOHN H. BISBEE
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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

I. DEFENDANT IS APPROPRIATELY PROCEEDING PURSUANT TO SUPREME COURT RULE 615(a) 1

Cases

People v. Encoh, 122 Ill.2d 176 (1988) 1

People v. Mullen, 141 Ill.2d 394 (1990) 1

People v. Lawler, 142 Ill.2d 548 (1991) 1

Rules

Supreme Court Rule 615(a) 1

II. IT WAS PLAIN, PREJUDICIAL ERROR AND A DENIAL OF DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS FOR DEFENDANT'S COUNSEL AND THE COURT TO PERMIT DEFENDANT TO BE TRIED ON THE FALSE WIFE BEATING INNUENDO WITHOUT EVEN THE BENEFIT OF A LIMITING INSTRUCTION 1

Cases

People v. Waller, 195 Ill.App.3d 376 (1990) 1

People v. Liberman, ___ Ill.App.3d ___ (No. 4-91-0038) (4th Dist. 1992) 1

People v. Cole, 29 Ill.2d 501 (1963) 2

People v. Hayes, 139 Ill.2d 89 (1990) 2, 3, 4

People v. Hendricks, 137 Ill.2d 31 (1990) 2, 3, 4

People v. Lindgren, 79 Ill.2d 129 (1988) 3

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990) 3

People v. Emerson, 97 Ill.2d 487 (1983) 3

1. The Evidence Was Not Offered For Any Appropriate Limited Purpose Other Than to Show A Propensity to Commit Crimes 4

Cases

U.S. v. Cronic, 466 U.S. 668 (1984) 5

People v. Hattery, 109 Ill.2d 449 (1986) 5

Strickland v. Washington, 466 U.S. 668 (1984) 5

People v. Hendricks, 137 Ill.2d 31 (1990).....5, 6

Michelson v. U.S., 335 U.S. 469 (1948) 6

2. No Instruction Was Given Limiting the Purposes For Which the Jury Could Consider the Other Bad Acts Evidence..... 6

Cases

People v. Richards, 64 Ill.App.3d 472 (4th Dist. 1978) 6

People v. Hendricks, 137 Ill.2d 31 (1990)..... 7

3. It was Not and Could Not Be Established To Any Degree of Satisfaction That the Wife Beating Occurred or That Defendant Did It..... 7

Cases

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990) 7, 8

Huddleston v. U.S., 485 U.S. 681 (1988) 7

Michelson v. U.S., 335 U.S. 469 (1948) 7

People v. Emerson, 97 Ill.2d 487 (1983)..... 8

Rules

Federal Rules of Evidence 404(b) 7

4. Permitting the Defendant to be Tried on the Wife Beating Innuendo Without a Limiting Instruction and Without the Evidence Being Offered for a Limited Purpose and Without Sufficient Evidence That the Wife Beating Even Occurred Deprived Defendatn Due Process of Law Under the Illinois and United States Constitutions..... 11

Cases

Estelle v. McGuire, 502 U.S. ___, 116 L.Ed.2d 385 (1991) 11, 12

People v. Hendricks, 137 Ill.2d 31 (1990) 12

Michelson v. U.S., 335 U.S. 469 (1948) 12

Huddleston v. U.S., 485 U.S. 681 (1988) 12

Rules

Federal Rules of Evidence Rule 404(b) 12

III. THE GIVING OF INSTRUCTIONS 13 AND 14 CEMENTED AND COMPOUNDED THE ORIGINAL ERROR OF THE WIFE BEATING INNUENDO 13

Cases

People v. McCauley, 2 Ill.App.3d 734 (2d Dist. 1972) 14

IV. THE PROSECUTOR'S CLOSING ARGUMENT PREMISED ON THE WIFE BEATING INNUENDO AND OTHERWISE CONSTITUTED PLAIN, PREJUDICIAL ERROR 14

Cases

People v. Hendricks, 137 Ill.2d 31 (1990) 15

Napue v. Illinois, 360 U.S. 264 (1959) 16

V. THE PEOPLE'S SECURING AN ORDER SUPPRESSING SEWARD'S EMPLOYMENT HISTORY AND THEN ARGUING THAT HE WAS A "GOOD COP" VIOLATED DUE PROCESS UNDER *NAPUE v. ILLINOIS*, 360 U.S. 264 (1959) AND *BRADY v. MARYLAND*, 373 U.S. 83 (1963) 17

Cases

Napue v. Illinois, 360 U.S. 264 (1959).... 17, 18, 19

Brady v. Maryland, 373 U.S. 83 (1963)... 17, 18, 19

People v. Hendricks, 137 Ill.2d 31 (1990)..... 18

U.S. v. Bagley, 473 U.S. 667 (1985)..... 18

Mooney v. Holohan, 294 U.S. 103 (1934)..... 19

VI. THE PEOPLE'S ARGUMENT THAT DEFENDANT'S COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE OVERLOOKS WHAT THE RECORD DEMONSTRATES..... 19

Cases

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990).... 21

People v. Hendricks, 137 Ill.2d 31 (1990)..... 21

People v. Summers, 202 Ill.App.3d 1 (4th Dist. 1990)..... 22

Huddleston v. U.S., 485 U.S. 681 (1988)..... 22

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 22

U.S. v. Cronic, 466 U.S. 668 (1984)..... 22

People v. Hattery, 109 Ill.2d 449 (1986)..... 22

VII. THE PROSECUTOR ERRED IN NOT INVESTIGATING JACOBSON'S COMPLAINT AND THE COURT ERRED IN QUASHING THE SUBPOENA DIRECTING THE PROSECUTOR TO TESTIFY CONCERNING JACOBSON'S COMPLAINT..... 24

Cases

Berger v. U.S., 295 U.S. 78 (1935)..... 25

People v. Gregory, 22 Ill.2d 601 (1961)..... 25

People v. Sweetin, 325 Ill. 245 (1927)..... 25

Statutes

Ill.Rev.Stat. Ch. 34 § 3-9005(1)..... 25

VIII. WITHOUT THE WIFE BEATING INNUENDO, THE PROSECUTION'S THEORY WAS IMPROBABLE AND DID NOT SATISFY ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT..... 26

Cases

People v. Gordon, 204 Ill.App.3d 123 (1st Dist. 1990) 26

In Re Winship, 397 U.S. 358 (1970) 26

IX. CONCLUSION 26